85-1285

Supreme Court, U.S.
FILED
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JAN 2 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

THE PEOPLE OF THE STATE OF MICHIGAN,

PETITIONER

vs.

ASKIA K_ _IL SHABAZ, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT

OF THE STATE OF MICHIGAN

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QUESTIONS PRESENTED

I.

IS THE FOURTH AMENDMENT IMPLICATED WHEN THE POLICE SIMPLY UNDERTAKE TO RUN AFTER AN INDIVIDUAL, WHO HAS RUN AT THE SIGHT OF THEM, WITHOUT ANY ACTUAL RESTRAINT ON THE FREEDOM OF MOVEMENT OF THAT INDIVIDUAL BY PHYSICAL FORCE OR SHOW OF AUTHORITY, SO THAT A WEAPON THROWN TO THE GROUND BY THE INDIVIDUAL CANNOT BE CONSIDERED ABANDONED ABSENT PROBABLE CAUSE OR REASONABLE SUSPICION TO UNDERTAKE THE PURSUIT?

II.

IF THE ANSWER TO QUESTION I IS THAT THE PURSUIT ITSELF, INDEPENDENT FROM THE SEIZURE, REQUIRES SOME LEVEL OF CAUSE, THEN DID THE FLIGHT OF THE RESPONDENT AFTER LEAVING A BUILDING AT WHICH NARCOTICS AND WEAPONS OFFENSE ARRESTS HAD BEEN MADE PREVIOUSLY, AND AFTER ATTEMPTING TO HIDE A PAPER BAG IN HIS VEST OR PANTS AFTER OBSERVATION OF THE UNMARKED POLICE CAR, CONSTITUTE REASONABLE SUSPICION FOR AN INVESTIGATIVE DETENTION?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

THE PEOPLE OF THE STATE OF MICHIGAN,

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vs.

ASKIA KHALIL SHABAZ, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT

OF THE STATE OF MICHIGAN

NOW COME the People of the State of Michigan, by John D. O'Hair, Prosecuting Attorney for the County of Wayne, Timothy A. Baughman, Deputy Chief, Civil and Appeals, and Andrea L. Solak, Principal Attorney, and pray that a writ of certiorari issue to review the judgment

of the Supreme Court of the State of Michigan entered in the above-entitled cause on December 4,1985.

OPINIONS BELOW

The opinion of the Michigan Court of Appeals is unreported and is appended as Appendix A. The Opinion of the Michigan Supreme Court is reported as __Mich__ (1985) and is appended as Appendix B.

STATEMENT OF JURISDICTION

The judgment of the Michigan Court of Appeals was entered on August 12, 1983. The judgment of the Michigan Supreme Court was entered on December 4, 1985. The jurisdiction of this Court is invoked under 28 USC Sec 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United

States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> ...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor

> shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The defendant was charged with Carrying A Concealed Weapon and bound over for trial in the Recorder's Court for the City of Detroit. Police Officer Surma testified at an evidentiary hearing to being on an auto patrol with his partners in the area of Woodward and Clairmont in the City of Detroit. The officers were in plain clothes, driving an unmarked standard police detective vehicle. The intersection was an area of high narcotics, weapons and robbery arrests. The defendant was seen leaving an address of 60 Clairmont, an apartment building

known for problems, and at which the Officer had personally mad 5-6 CCW and 10 narcotic arrests. The defendant was walking eastbound on Clairmont and was approximately 50 feet from the westbound patrol car, when the defendant looked in their direction and began stuffing a brown paper bag into his vest or pants. The defendant walked to a point where he and the car would pass, and as the car began to slow down, he began to run. An officer got out of the car and pursued the defendant; however, at no time did he call out, or command the defendant to halt. The defendant ran into a storefront dooorway, turned and attempted to leave, but was restrained by the officer. The officer retrieved the bag which was thrown into the vestibule, examined the contents, finding a revolver, which is the subject of the charge against him.

REASONS FOR GRANTING THE WRIT

The Michigan Supreme Court upheld a trial court dismissal of a possession of a concealed weapons charged finding that the totality of circumstances did not provide the particularized suspicion that criminal activity was afoot so as to justify the temporary detention of the defendant, thus violating the respondent's privacy rights under the Fourth Amendment. The Court adopted the three generic classes of police-citizen encounters proposed by Justice White in the plurality opinion in Florida v Royer, 460 US 491; 103 S Ct 1319; 75 L Ed 2d 229 (1983). The State argued that there was no Fourth Amendment infringement, characterizing the police-citizen encounter as an "investigatory pursuit", based on reasonable suspicion and "an assessment of the whole picture" from the

specialized viewpoint of the trained law enforcement officer. United States v Cortez, 449 US 411, 417; 101 S Ct 690; 66 L Ed 2d 621 (1981). The majority opinion undertook an analysis of the "first tier" under Royer finding the Respondent was not free to go on his way. The dissent found as a matter of law that the act of running after another is not a detention for investigation, thus the conduct did not constitute a stop nor violate Fourth Amendment privacy rights. It is submitted that the latter interpretation accords with this Court's definition of a seizure.[1]

> We adhere to the view that a person is 'seized' only when, by means of

---

[1]The Petitioner's position has remained constant. There is no Fourth Amendment violation. While the State argued that the "second" tier had not been violated, the Majority and the Dissent "passed" on the question of whether the "first" tier was violated. The issue is properly before this Court. Dewey v Des Moines, 173 US 193, 197-8 (1898).

> physical force or show of authority, his freedom of movement is restrained. Only when such restraint is imposed is there any foundation whatever for invoking constitutional safeguards.
>
> United States v Mendenhall, 446 US 544,553-4; 100 S Ct 1870; 64 L Ed 2d 497 (1980).

The instant facts demonstrate there was no infringemnt of a citizen's right to walk away, nor any restraint upon the liberty of a citizen who took his own evasive course of action upon sighting an unmarked car. If the Fourth Amendment is not implicated, the retrieval of the abandoned property is not a result of illegal police action, and is not subject to the poisonous tree analysis under Wong Sun v United States, 371 US 471; 83 S Ct 407; 9 L Ed2d 441 (1963).

If the pursuit itself, independent from the seizure, requires some level of cause, the unprecipitated flight of the Respondent after leaving a building at which narcotics and weapons offense arrests had been previously made, and after attempting to hide a paper bag in his vest or pants upon observation of an unmarked police car, constitutes reasonable suspicion from the specialized viewpoint of a trained law enforcement officer. Cortez, supra at 417; United States v Green, 670 F 2d 1148, 1152 (CA DC, 1981). Terry v Ohio, 392 US 1; 88 SCt 1868; 20 L Ed 2d (1968).

CONCLUSION

It is respectfully submitted that for the reasons outlined above plenary review should be granted.

Respectfully submitted,

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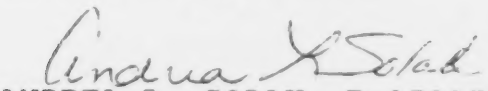
County of Wayne

TIMOTHY A. BAUGHMAN
Deputy Chief
Civil and Appeals



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Dated: January 20, 1986
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APPENDIX

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

-vs- No. 68266

ASKIA KHALIL SHABAZ,

Defendant-Appellee.

BEFORE: D.F. Walsh, P.J.; Beasley and D.L. Sullivan,* JJ.

PER CURIAM

On September 3, 1982, defendant, Askia Khalil Shabaz, who was charged with carrying a concealed weapon, contrary to MCL 750.277; MSA 28.424, filed a motion to suppress the evidence and quash the information. After an evidentiary hearing held on October 8, 1982, the trial court granted defendant's motion. From this ruling, the prosecutor, pursuant to MCL 770.12(1)(c); MSA 28.1109(1)(c), appeals as of right.

* Circuit Judge, sitting on Court of Appeals by assignment.

The lone witness testifying at the evidentiary hearing was Kenneth Surma, one of the arresting officers. While patrolling the area of Woodward and Clairmont Avenues in Detroit with his partner during the evening of July 10, 1982, Surma and his partner, who were in plainclothes and an unmarked car, observed defendant leaving an apartment building located at 60 Clairmont Avenue. According to Surma, defendant looked in the direction of the unmarked car and placed a small paper bag under his vest.[1] When the officers reduced the speed of their car, defendant again looked in their direction and immediately started running on Clairmont toward Woodward Avenue. Surma alighted from the car and followed defendant, who ran to a building and dropped the paper bag on the doorway. As defendant came out of the doorway, Officer Surma and his partner

apprehended him. Officer Surma picked up the closed paper bag and, upon opening it, found a four inch blue steel revolver.

Officer Surma also testified that (1) neither he nor his partner had any information that defendant had committed or was preparing to commit a felony, (2) defendant did not have any visible weapon or contraband on his person, (3) he and his partner had not received a report that a felony had been committed in the area, and (4) at no time during their observation and pursuit of defendant did he or his partner identify themselves as police officers or ask defendant to halt.

In granting defendant's motion to suppress the revolver, the trial court, relying on People v Terrell,[2] held that the police officers did not have specific knowledge to justify an investigatory stop of defendant. The trial court

reasoned that since the initial intrusion was unlawful, the seizure of the closed paper bag containing the concealed weapon was impermissible.

On appeal, the prosecutor maintains that the trial court's holding that the facts and ircumstances did not justify an investigatory pursuit and stop of defendant was clearly erroneous. Essentially, the prosecutor asserts that the seizure of the weapon was permissible under two theories: (1) the investigatory pursuit and stop was proper because when defendant was first observed by the officers he placed a small paper bag under his vest, leading the officers to believe that defendant was attempting to hide an article and (2) defendant did not have standing to claim that the evidence was illegally seized, as he abandoned the bag in the doorway of the building.

The parties agree that the instant

situation is governed by the "stop and frisk" doctrine enunciated by the United States Supreme Court in Terry v Ohio[3] and Sibron v New York.[4] The Terry court articulated the rationale for permitting police officers to conduct investigatory stops:

> "One general interest is of course that of effective crime prevention and detection; it is this interest which underlies the recognition that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest."[5]

When the police are engaged in activities of this nature, the Terry court cautioned:

> "Our evaluation of the proper balance that has to be struck in this type of case leads us to conclude that there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime.

> The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. *** And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience."[6] (Citations and footnote omitted.)

The foregoing case was discussed by Professor LaFave in the following passage:

> "In the Terry case, the Chief Justice criticizes 'the distinctions of classical "stop-and-frisk" theory' on the ground that they serve to divert attention from the basic question of whether the officer's conduct was reasonable. The distinctions to which he referred, of course, are between a stopping on the street and a to-the-station arrest, and also between a frisk for weapons and the more extensive search that is commonly made incident to an arrest. Abjuring such labels, the Chief Justice concludes that they do not mark the boundaries of the fourth amendment; restraining a person on the street is certainly a 'seizure,' and an exploration of the outer surfaces of his clothing

is beyond question a 'search.' The Court therefore rejects 'the notions that the fourth amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a 'technical arrest' or a 'full-blown search.'

"It is hard to see how anyone could quarrel with that conclusion. Indeed, it is somewhat surprising that the Court labors so hard to reach it, except for the fact that it assumed that 'classical "stop-and-frisk" theory' somehow supports a contrary position. This is not the case. Notwithstanding an occasional unfortunate choice of words in a few decisions, it has never been seriously contended that merely characterizing certain police activity as a 'stop' or a 'frisk' removes that conduct from the limitations of the fourth amendment. Rather, the traditional argument has been that the words 'stop' and 'frisk' are convenient ways of describing certain limited intrusions which, because of their scope, should be permitted in circumstances which would not justify the more serious intrusions of a to-the-station arrest accompanied by a search for weapons and evidence. The Supreme Court does not reject that argument, but embraces it.

"This is not to suggest, however, that the Court's failure to attach importance to the 'stop' and 'frisk' labels is not of major significance. As one commentator

> has correctly observed, a most important feature of these cases 'is that the Supreme Court of the United States has dissipated the notion that the search and seizure provisions of the Fourth Amendment are subject to verbal manipulation.' It is the reasonableness of the officer's conduct, not what the state chooses to call it, which is in issue. If courts adhere to this principle, that 'the importance of another verbalism--the term "arrest"--which for a long time has tended to dominate legal thinking in this area,' may wane."[7]

Our examination of the record convinces us that the trial court correctly held that insufficient facts and circumstances existed to provide the police officers with a reasonable belief that criminal activity may have been in progress. Like the factual setting in Terrell, supra, defendant's surreptitious gestures may have aroused the officers' general suspicions, but absent specific knowledge on the part of the officers, defendant's actions were insufficient to warrant an investigatory intrusion.[8] The officers' pursuit and stop of the

defendant was not justified at its inception, and thus, was an unlawful invasion of defendant's Fourth Amendment rights.

Of particular import to our holding are the following factors: (1) the officers were not investigating a recently committed crime in the area of Clairmont and Woodward Avenues; (2) defendant was unknown to the officers and was not the subject of an arrest warrant; (3) defendant did not resemble an individual suspected of committing a crime; (4) defendant did not have any contraband or weapons visibly on his person; (5) the officers were not in uniform and were travelling in an unmarked police car; and (6) during their pursuit of defendant, the officers did not identify themselves as policemen.

The instant matter is distinguishable from People v Carter,[9] a case primarily

relied upon by the prosecutor. In Carter, police officers encountered the defendant at nighttime in an area where several burglaries and rapes had occurred. Thereupon, the uniformed officers pursued defendant, culminating in the defendant throwing a plastic bag onto the ground. An officer lifted the bag and saw that it contained a brown substance which he believed was, and that turned out to be, heroin. A patdown search of defendant uncovered a loaded automatic pistol.

The factors justifying an investigatory pursuit and stop of the defendant in Carter are absent here: defendant Carter was seen in an area in which numerous crimes had been recently committed, the officers were travelling in a semi-marked patrol car, and the officers were in uniform, a fact which prompted the defendant to turn and run

toward a building which had been the scene of a recent burglary.

Based on our conclusion that the investigatory pursuit and stop of defendant was improper, the warrantless seizure of the brown paper bag was impermissible under the "plain view" exception. Since defendant's divestment of the bag containing the concealed weapon was contemporaneous with the illegal investigatory pursuit and stop, the evidence is inadmissible under the fruits of the poisonous tree doctrine enunciated in Wong Sun v United States.[10]

It is noteworthy that the prosecutor did not contend at the evidentiary hearing that defendant, as a result of abandoning the property, lacked standing to contest the seizure of the concealed weapon. Inasmuch as the issue was not raised in the trial court, it is not

preserved for appeal.[11] Nevertheless, we have considered the issue and hold that defendant's dropping of the package in the officers' presence does not purge the illegality of the unlawful investigatory pursuit and stop.[12]

The trial court's ruling on defendant's suppression motion was not clearly erroneous.

Affirmed.

(signed) Daniel F. Walsh
William R. Beasley
Daniel L. Sullivan

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[1] Officer Surma stated that defendant was wearing neither a suit jacket nor an outer coat.

[2] 77 Mich App 676; 259 NW2d 187 (1977).

[3] 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968).

[4] 392 US 40; 88 S Ct 1889; 20 L Ed 2d 917 (1968).

[5] Terry, supra, at 392 US 1, 22.

[6] Id. at p 27.

[7] LaFave, Street Encounters and the Constitution: Terry, Sibron, Peters and Beyond, 67 Mich L Rev 39, 51-52 (1968). See also, Anno: Stop and Frisk, 32 L Ed 2d 942 (1972).

[8] See also, People v Thomas, ___Colo___; ___P2d___; 33 Cr L Rep 2066 (1983), where the Colorado Supreme Court held that furtive gestures made by an individual which may appear to be an effort to avoid police contact do not warrant an investigatory stop or pursuit unless coupled with the officer's specific knowledge of criminal conduct.

[9] 96 Mich App 694; 293 NW2d 681 (1980), lv den 410 Mich 872 (1980).

[10] 371 US 471; 83 S Ct 407; 9 L Ed 2d 441 (1963). For discussions of the "fruit of the poisonous tree doctrine", see Pitler, the Fruit of the Poisonous

Tree Revisited and Shepardized, 56 Cal L Rev 579 (1968); McCormick, Evidence (2d 3d), Sec 177, pp 411-416.

11 People v Dorrikas, 354 Mich 303, 316; 92 NW2d 305 (1958); 2 Gillespie, Michigan Criminal Law & Procedure (1978 Rev), Sec 786.2, pp 546-547; 1 Wigmore, Evidence (3d ed), Sec 18, pp 322-323.

12 In People v Kirchoff, 74 Mich App 641, 645-647; 254 NW2d 793 (1977), this court held that the defendant had abandoned a knapsack containing marijuana. However, the court also held that the initial investigatory stop was justified. Additionally, the defendant discarded the knapsack and continued in flight from the officers, where the within defendant was apprehended within a few feet of the paper bag.

NOTE: Where possible, a syllabus (headnote) such as this will be released at the time the opinion is released. This syllabus is not a part of the opinion of the Court but has been written by the Reporter of Decisions as a summary of the case for the convenience of readers. See United States v Detroit Lumber Co, 200 US 321, 337; 26 S Ct 282; 50 L Ed 499 (1906).

PEOPLE V SHABAZ

Docket No. 72567. Argued March 6, 1985 (Calendar No. 7). -- Decided December 4, 1985.

Askia K. Shabaz was charged with carrying a concealed weapon. The Detroit Recorder's Court, Michael F. Sapala, J., granted the defendant's motion to suppress evidence of the weapon and dismissed the case. The Court of Appeals, D.F. Walsh, P.J., and Beasley

and Sullivan, JJ., affirmed in an unpublished opinion per curiam (Docket No. 68266). The People appeal.

In an opinion by Justice Tyan, joined by Justices Levin, Brickley, Cavanagh, and Riley, the Supreme Court held:

Suppression of evidence of the weapon was proper. The seizure of the defendant was unreasonable and, but for the illegal seizure, the weapon would not have been discovered. The circumstances surrounding the seizure of the defendant as they appeared to the police officers at the time of the seizure, considered in their totality, did not provide the requisite particularized suspicion of criminal activity based on objective observation sufficient to outweigh the defendant's privacy interests under the Fourth Amendment.

1. The Fourth Amendment does not provide a guarantee against all searches

and seizures, but only against those that are unreasonable. The guarantee applies to all seizures of a person, including seizures involving only brief detention short of traditional arrest. A seizure of a person, to be valid, generally must involve probable cause to arrest. However, a valid investigatory stop may be made by the police with less than probable cause. Such a stop must be reasonable, i.e., it must be justified at its inception and must be reasonably related in scope to the circumstances which justified interference by the police with the person's personal security. Justification must be based on an objective manifestation that the person stopped was or was about to be engaged in criminal activity. The totality of the circumstances must be taken into account, and must show that the detaining officer had a particular-

ized and objective basis for the suspicion of criminal activity.

2. The approach of a person by the police in a public place to inquire whether the person is willing to answer questions, the actual questioning of the person, or the introduction in a criminal prosecution of the person's voluntary answers to such questions is not violative of the Fourth Amendment guarantee. Nor would an encounter with a properly identified officer, without more, amount to a seizure requiring some level of objective justification. The person approached, however, need not respond to the officer's questions or may decline to answer the questions, and may not be detained even momentarily without reasonable, objective grounds for doing so.

3. No full search of a person who is merely suspected of criminal activity or

the person's effects may be made without probable cause to arrest. Nor may the police seek to verify suspicions by means that approach the conditions of arrest. Probable cause to arrest requires facts and circumstances within an officer's knowledge that are sufficient to warrant a prudent person or one of reasonable caution to believe that the person suspected has committed, is committing, or is about to commit an offense. The fact that a person may seek to conceal the object of personal business, even in public, does not provide probable cause to arrest. The police may not conclude, merely because an object or a transaction is not openly displayed, that it is necessarily illegal.

4. In this case, the police did not properly identify themselves and approach the defendant for the purpose of questioning him. When he attempted to go on

his way, he was pursued and seized by the officers. At the time the officers saw the defendant and began to chase him, they did not have probable cause to arrest him. The facts that the defendant was observed at night in a high-crime neighborhood leaving a building in which the officers previously had made arrests for concealed-weapons violations and narcotics offenses and that, after looking in the direction of the officers' unmarked police vehicle, he attempted to conceal a paper bag under his vest afforded the officers no authority to confront the defendant or to require him to submit to an investigatory stop and interrogation because, on the basis of what they had observed, they had no articulable or particularized grounds to reasonably suspect that the defendant was, had been, or was about to be engaged in criminal activity. Nor did the

defendant's flight at the approach of the officers' unmarked police vehicle, by itself, support a reasonable suspicion. While the flight may have heightened the officers' general suspicion, it could not, alone, supply the particularized, reasoned, articulable basis to conclude that criminal activity was afoot so as to justify a temporary seizure.

5. The divestment by the defendant of a paper bag containing a revolver after being pursued by the police was not clearly abandonment. Whether or not abandonment was intended, it would not dissipate the taint flowing from the unreasonable conduct of the police. The pursuit of the defendant by the officers was an effective seizure. A seizure occurs when a reasonable person would believe that he is not free to leave.

Affirmed.

Justice Boyle, joined by Chief Justice

Williams, dissenting, stated that in this case there was no intrusion of protected interests sufficient to amount to a stop. While the reasonable belief of a person actually stopped by the police is relevant to whether a seizure has occurred, the threshold issue, whether a stop occurred, is one of law. On the record in this case, the pursuit of the defendant by the officers as a matter of law, was not a detention for investigation. Not even a forcible stop occurred before the defendant discarded the bag. Even if the pursuit was a stop, it is clear on the basis of the totality of the circumstances that the seizure was justified by a reasonable suspicion, founded on objective facts, that the defendant was involved in criminal activity. Because any seizure of the defendant was based on reasonable suspicion, the seizure of the bag was justified.

7/March 1985

STATE OF MICHIGAN

SUPREME COURT

Filed Dec 4 1985

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v No. 72567

ASKIA KHALIL SHABAZ,

Defendant-Appellee.

BEFORE THE ENTIRE BENCH

RYAN, J.

Defendant, Askia Khalil Shabaz,[1] was arrested for carrying a concealed weapon, a .357 caliber Smith and Wesson revolver, in violation of MCL 750.227; MSA 28.424. Following a preliminary examination held in the 36th District Court on July 22, 1982, he was bound over to the Recorder's Court for the City of Detroit for trial as charged. In October, 1982, an evidentiary hearing was held in the Recorder's Court upon the defendant's

motion to quash the information or, in the alternative, to suppress the revolver as evidence.[2] At the conclusion of the hearing, the court granted the motion to suppress the evidence, and dismissed the case. Upon the prosecutor's appeal, the Court of Appeals affirmed the trial court's ruling, in an unpublished opinion per curiam, finding that the trial court's action was not clearly erroneous. We granted leave to appeal, 418 Mich 950 (1984).

I

The facts available to us are taken from the preliminary examination and the evidentiary hearing, from the testimony of Officer Kenneth Surma, who was the only witness at both hearings.

On July 22, 1982, at approximately 9:00 p.m., Detroit Police Officers Surma, Scotsky, and Hayes were on patrol in an unmarked police vehicle in the area of

Clairmount and Woodward Avenues in the City of Detroit. The officers were in plain clothes, and Officer Scotsky was driving.

The vehicle was proceeding westbound on Clairmount from Woodward when Officer Surma observed defendant leaving a building at 60 Clairmount, which is on the north side of Clairmount and which comprises approximately thirty apartments.

Surma observed defendant carrying a small brown paper bag, and walking east on Clairmount toward Woodward Avenue. At the time he observed defendant leaving the building, Surma was in the police vehicle approximately fifty feet from the defendant, and the police car was moving toward defendant. Defendant looked in Surma's direction and began "stuffing a paper bag like under his vest," or "in his pants." The driver, Officer Scotsky,

slowed the vehicle, and the defendant and the scout car passed each other. When the officers' vehicle had nearly come to a complete stop, defendant "took off running." Surma testified: "We started slowing down to take a better look at what he was doing. As we were coming to a stop, he immediately started to run."

Officer Scotsky put the car in reverse and backed the vehicle to the corner of Woodward and Clairmount. When the car was approximately ten to fifteen feet from defendant, Surma got out of the car and chased the defendant south on Woodward while Officer Hayes "backed up" Surma. Surma chased defendant a distance of about three store fronts, and observed defendant enter a doorway at 9037 Woodward. During the chase, Surma did not observe anything in defendant's hands. By the time Surma reached the doorway the defendant had entered,

defendant was coming out. Surma grabbed defendant and, as the defendant tried to push away, Surma "tossed him towards Officer Hayes," and Hayes subdued the defendant. While chasing the defendant, Hayes had pulled his service revolver and, when defendant and Hayes collided, the firearm discharged, although no one was was struck. Surma then went into the vestibule of the building and retrieved a closed, brown paper bag. Surma did not know what was in the bag until after he retrieved it. The bag contained a "Smith & Wesson, four inch blue steel revolver, .357."

Officer Surma confiscated the weapon, unloaded it, and asked the defendant if he had a permit. After receiving a negative reply from the defendant, Surma placed defendant under arrest for unlawfully carrying a concealed weapon. During the chase, none of the officers

had identified themselves as police officers or given any order or command to the defendant.

Surma testified, at the preliminary examination, that he thought the defendant was "hiding something," and that "I believed it to be either weapon [sic] or narcotics," and that was the reason Officer Scotsky stopped the car. At the time Surma observed the defendant leave the apartment building on Clairmount, Surma did not have "any reports of a felony having been committed with the description of Mr. Shabaz," and Surma could not recall ever having seen the defendant before. When asked, "when you grabbed him, you didn't have any additional information or sighting that he had committed a felony or was about to commit a felony, had you?" Officer Surma replied, "No, I did not." Surma also acknowledged that there is a supermarket

very close to the apartment building and that people "normally bring things out of the supermarket in the same type of bag." In his eleven years on the police force, Officer Surma had made five to six arrests for concealed weapons offenses, and approximately ten narcotics arrests at the Clairmount address. Surma testified that, at the intersection of Clairmount and Woodward, one might expect to find narcotics, concealed weapons, and prostitutes, and that the police had problems with the building at 60 Clairmount in the past.

II

Following Officer Surma's testimony at the preliminary examination, the prosecutor moved the court to bind the defendant over to the Recorder's Court as charged. In opposition, defense counsel argued that "[t]here was no probable cause for the initial focus by the police

officers"; that defendant was near King Cole's grocery market; that any number of people in that apartment building would have paper bags; that there were any number of reasons "th[at] person would place the paper bag under his vest"; and that this is a "clear case of post hoc probable cause, rationalizing their subsequent actions after pursuing his person on a chimeral [sic] suspicion."

The prosecutor responded:

> "[N]ot everybody who has a paper bag tried [sic] to stuff it in their pants and tries to run away from people when they look at them. The officers did have a reasonable suspicion to at least stop the defendant at this point, and he continued to flee. Before he was even stopped, he discarded the bag. There's no search and seizure. It's just a situation that would justify a stop by a police officer and a pat down, which they didn't even get to that point. I don't believe that there's a search and seizure issue here, your Honor."

Defendant countered that the question is not one of search and seizure, but of probable cause for an arrest, and that

there was no probable cause for an arrest.

In binding the defendant over for trial, the district court simply stated, "The Court does find there's a question of fact and does bind the defendant over as charged, carrying a concealed weapon on a person."

At the evidentiary hearing in Recorder's Court, the prosecutor argued that Surma's actions were not unreasonable. He noted that the neighborhood in question was a high-crime area, that defendant was not coming out of a supermarket with a bag of groceries, and that an officer of eleven years "on the street knows pretty much whether--and as he indicated he thought either narcotics or a gun, from his experience and from the Court's, I think knowledge of Clairmount and Woodward would be a very reasonable assumption."

The defendant relied on his "brief and

memo" and did not offer argument. After observing that Officer Surma was a "totally credible witness," the court stated it was relying on People v Terrell, 77 Mich App 676; 259 NW2d 187 (1977),[3] and granted defendant's motion to suppress the evidence and dismissed the case.

The Court of Appeals, after first observing that "[t]he parties agree that this initial situation is governed by the 'stop and frisk' doctrine enunciated by the United States Supreme Court in Terry v Ohio, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968)," applied the Terry "stop and frisk" standard to the facts of this case and concluded:

> "Our examination of the record convinces us that the trial court correctly held that insufficient facts and circumstances existed to provide the police officers with a reasonable belief that criminal activity may have been in progress. Like the factual setting in Terrell, supra, defendant's surreptitious gestures may have aroused the officers' general

suspicions, but absent specific knowledge on the part of the officers, defendant's actions were insufficient to warrant an investigatory intrusion. The officers' pursuit and stop of the defendant was not justified at its inception and, thus, was an unlawful invasion of defendant's Fourth Amendment rights.

"Of particular import to our holding are the following factors:: (1) The officers were not investigating a recently committed crime in the area of Clairmount and Woodward Avenues; (2) defendant was unknown to the officers and was not the subject of an arrest warrant; (3) defendant did not resemble an individual suspected of committing a crime; (4) defendant did not have any contraband or weapons visibly on his person; (5) the officers were not in uniform and were travelling in an unmarked police car; and (6) during their pursuit of defendant, the officers did not identify themselves as policemen."

We granted leave to appeal, 418 Mich 950 (1984).

III

The Fourth Amendment provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...." US Const, Am IV. [4]

The Fourth Amendment is not a guarantee against all searches and seizures, but only against those that are unreasonable. United States v Sharpe, ____US____; 105 S Ct 1568; 84 L Ed 2d 605 (1985). The Fourth Amendment applies to all seizures of a person, including seizures that involve only a brief detention, short of traditional arrest. United States v Brignoni-Ponce, 422 US 873, 878; 95 S Ct 2574; 45 L Ed 2d 607 (1975); Davis v Mississippi, 394 US 721; 89 S Ct 1394; 22 L Ed 2d 676 (1969). Prior to Terry v Ohio, supra, any restraint on the person amounting to a seizure for the purposes of the Fourth Amendment was invalid unless justified by probable cause. Dunaway v New York, 442 US 200, 207-209; 99 S Ct 2248; 60 L Ed 2d 824 (1979). Terry created a limited exception to the probable cause requirement.

Given the parties' agreement that the lawfulness of the seizure of the revolver in question "is governed by the 'stop and frisk' doctrine enunciated...in Terry," we begin our analysis with a review of that case.

In Terry, a police officer observed the defendant, along with two other men, engaging in furtive behavior that the Supreme Court described as an "elaborately casual and oft-repeated reconnaissance of [a] store window" in downtown Cleveland which the arresting officer later characterized at trial as "casing a job, a stickup." The officer, a plainclothes detective of thirty-five-years experience, concluded that the three men were about to commit a robbery. The officer approached the three men, identified himself as a police officer, and asked for their names. After receiving a mumbled reply, the officer

conducted a pat-down search of the three men, obtaining two pistols, one from defendant Terry.

Terry's motion to suppress the evidence was denied, and the denial was affirmed by the Supreme Court of the United States. The Court found that the police conduct constituted a seizure within the meaning of the Fourth Amendment. "It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." 392 US 16. The Court stated:

> "We therefore reject the notions that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a 'technical arrest' or a 'full-blown search.'" 392 US 19.

The constitutional inquiry under Terry is whether the seizure and subsequent search are reasonable.

> "We must decide whether at that point it was reasonable for [the

police officer] to have interfered with petitioner's personal security as he did. And in determining whether the seizure and search were 'unreasonable' our inquiry is a dual one--whether the police officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified interference in the first place." 392 US 19-20.

The Court concluded that there was narrowly drawn authority to permit a search for weapons where the officer has reason to believe he is dealing with an armed and dangerous individual. The primary thrust of this exception is the basic government interest in protecting its police officers. The specific holding of Terry is narrow:

"We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel

> his reasonable fear for his own or others' safety, he is entitled to the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. Such a search is a reasonable search under the Fourth Amendment, and any weapon seized may be properly introduced in evidence against the person from whom they were taken." 392 US 30-31.

The Court, in Terry, specifically declined to deal with the question of an "investigative seizure upon less than probable cause for purposes of "'detention' and/or interrogation," 392 US 19, n 16, but, in subsequent cases, the Court has developed standards applicable to investigatory stops by police. This development if reviewed and summarized in United States v Cortez, 449 US 411, 417-418; 101 S Ct 690; 66 L Ed 2d 621 (1981):

> "An investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be engaged in criminal activity. Brown

v Texas 443 US 47, 51 [99 S Ct 2637; 61 L Ed 2d 357] (1979); Delaware v Prouse, 440 US 648, 661 [99 S Ct 1391; 59 L Ed 2d 660] (1979); United States v Brignoni-Ponce, [422 US 873, 884; 95 S Ct 2574; 45 L Ed 2d 607 (1975)]; Adams v Williams, 407 US 143, 146-149 [92 S Ct 1921; 32 L Ed 2d 612] (1972); Terry v Ohio, supra, at 16-19.

Courts have used a variety of terms to capture the elusive concept of what cause is sufficient to authorize police to stop a person. Terms like 'articulable reasons' and 'founded suspicion' are not self-defining; they fall short of providing clear guidance dispositive of the myriad factual situations that arise. But the essence of all that has been written is that the totality of the circumstances--the whole picture--must be taken into account. Based upon that whole picture, the detaining officer must have a particularized and objective basis for suspecting the particular person stopped of criminal activity. See, e.g., Brown v Texas, supra, at 51; United States v Brignoni-Ponce, supra, at 884.

"The idea that an assessment of the whole picture must yield a particularized suspicion contains two elements, each of which must be present before a stop in permissible. First, the assessment must be based upon all of the circumstances. The analysis proceeds with various objective

observations, information from police reports, if such are available, and consideration of the modes or patterns of operation of certain kinds of lawbreakers. From these data, a trained officer draws inferences and makes deductions--inferences and deductions that might well elude an untrained person.

"The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same--and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.

"The second element contained in the idea that an assessment of the whole picture must yield a particularized suspicion is the concept that the process just described must raise a suspicion that the particular individual being stopped is engaged in wrongdoing. Chief Justice Warren, speaking for the Court in Terry v Ohio, supra, said that '[t]his demand for specificity in the information upon which police action is predicated is the central teaching of the Court's Fourth Amendment jurisprudence.' Id. at 21, n 18. (Emphasis added.) See

also, Brown v Texas, supra, at 51; Delaware v Prouse, supra, at 661-663; United States v Brignoni-Ponce, supra at 884."

IV

In an apparent effort to bring some organization out of the kaleidoscope of Fourth Amendment search and seizure cases decided by the Supreme Court, particularly concerning various kinds of police-citizen encounters, Justice White, in a plurality opinion in Florida v Royer, 460 US 491; 103 S Ct 1319; 75 L Ed 2d 229 (1983), divided such encounters into three tiers. 5

The first tier consists of an officer asking a person questions in a public place.

> "[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions. See Dunaway v

New York, [442 US 200, 210, n 12; 99 S Ct 2248; 60 L Ed 2d 824] (1979); Terry v Ohio, 392 US at 31, 32-33 (Harlan, J., concurring), id., at 34 (White, J., concurring). Nor would the fact that the officer identifies himself as a police officer, without more, convert the encounter into a seizure requiring some level of objective justification. United States v Mendenhall, 446 US 544, 555 [100 S Ct 1870; 64 L Ed 2d 497] (1980) (opinion Stewart, J.). The person approached, however, need not answer any questions put to him; indeed, he may decline to listen to the questions at all and may go on his way. Terry v Ohio, 392 US at 32-33 (Harlan, J., concurring), id., at 34; 20 L Ed 2d 889; 88 S Ct 1868; 44 Ohio Ops 2d 383 (White, J., concurring). He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds. United States v Mendenhall, supra, 556 (opinion of Stewart, J.). If there is no detention--no seizure within the meaning of the Fourth Amendment -- then no constitutional rights have been infringed." 460 US 497-498.

The second tier of contact is the Terry stop described above. As a limited exception to the general rule that all restraints of the person must be

justified by probable cause, Terry provides that certain seizures are justifiable under the Fourth Amendment if there is articulable suspicion that a person has committed or is about to commit a crime.

> "Terry and its progeny, nevertheless, created only limited exceptions to the general rule that seizures of the person require probable cause to arrest. Detentions may be 'investigative' yet violative of the Fourth Amendment absent probable cause. In the name of investigating a person who is no more than suspected of criminal activity, the police may not carry out a full search of the person or of his automobile or other effects. Nor may the police seek to verify their suspicions by means that approach the conditions of arrest." 460 US 499 [6]

The third tier of contact is the arrest of a person based on probable cause.

> "This Court repeatedly has explained that 'probable cause' to justify an arrest means facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that

> the suspect has committed, is committing, or is about to commit an offense." Michigan v DeFillippo, 443 US 31, 37; 99 S Ct 2627; 61 L Ed 2d 343 (1979).

V

Plainly, the police encounter with defendant in this case was not at either the first or third tier of the Royer analysis. The officers did not approach Shabaz merely for the purpose of questioning him, after first identifying themselves as police officers, nor was the defendant free to "go on his way." Indeed, when he attempted to "go on his way," he was pursued and seized by the officers. And when the officers spotted the defendant and began to chase him, they did not have probable cause to arrest him. The prosecutor concedes as much, acknowledging in his brief and in oral argument, that the police-citizen encounter in this case was an "investigatory pursuit and stop," and

that its constitutionality is to be tested according to the standards announced in Terry. 7

We turn, therefore, to analyze the police encounter with Shabaz in this case according to the principles announced in Terry and the United States Supreme Court cases applying Terry. While factually there can by many justifications for a so-called "Terry stop," see footnote 6, the criteria for a constitutionally valid limited intrusion upon a citizen's liberty, short of probable cause for arrest, are that the police must have a particularized suspicion, based on an objective observation, that the person stopped has been, is, or is about to be engaged in criminal wrongdoing. Brown v Texas, supra. As the Supreme Court stated in United States v Cortez, supra, the "articulable reasons" or "founded suspicion" or "particularized suspicion"

that criminal activity is afoot must derive from the police officer's assessment of the "whole picture" -- the totality of the circumstances with which he is confronted.

The "whole picture" with which the officers were confronted in this case, on the evening in question, can only be described by reference to individualized facts:

-- The defendant was observed on the street at the night in a high-crime neighborhood;

-- He was seen leaving an apartment building wherein the observing officers had previously made a number of arrests for concealed-weapons violations and narcotics offenses;

-- After looking in the direction of the unmarked police vehicle, the defendant was observed "stuffing a [small] paper bag like under his vest"

of "in his pants"; and

-- When the officers slowed their vehicles to a stop, defendant "took off running."

Whether all of the foregoing factors, considered in their totality, provided the officers with an articulable or particularized suspicion based on objective manifestations that Shabaz was involved in criminal wrongdoing can only be determined by evaluating the individual circumstances and determining whether collectively they are greater than the sum of their parts, and build to form the requisite objective basis for the particularized suspicion that criminal wrongdoing is afoot that would justify a Terry stop.

While the crime rate in a neighborhood may be a valid consideration to be taken into account when assessing reasonable suspicion, United States v Davis, 147 US

App DC 400, 403; 458 F2d 819 (1972), United States v White, 211 US App DC 72; 655 F2d 1302 (1982), that alone would not establish the grounds for an investigatory stop. Brown v Texas, supra. Defendant's presence in a high-crime neighborhood does nothing to distinguish him from any number of other pedestrians in the area. It provides no particular reasonable basis for suspicions to the activity of the defendant. The same must be said for his emergence from an apartment building known to the police to be the site of previous criminal activity. It cannot reasonably be concluded that everyone seen carrying a small paper bag, entering or leaving an apartment building where previous concealed weapons and narcotics arrests have been made, is likely to be involved in such activity. A high neighborhood crime rate ordinarily requires the

presence of both innocent victims and criminal perpetration in the same neighborhood.

Similarly, defendant's effort to conceal the paper bag in his vest, by itself, did not afford grounds for a stop. There was no evidence that the size or shape of the bag suggested that it contained a weapon. It may have contained money, liquor, food, jewelry, or any number of small items one might lawfully carry in a small bag and wish to conceal from view while walking down a darkened street in a high-crime area. It might, on the other hand, have contained unlawful contraband or an illegally concealed weapon. It is precisely because the officers could only speculate about the contents of the bag that they had no reasonable or articulable basis to conclude what its contents were.

> "[T]he sole fact that individuals may seek to conceal the object of

> their business from potentially prying eyes, even on the public sidewalk, does not grant the police the power to arrest them. While it is true that persons engaged in illegal transactions will desire to conceal those transactions, the desire for privacy in one's affairs is common among law-abiding persons as well. Thus, the police cannot conclude that merely because an object or a transaction is not openly displayed, it is necessarily illegal." United States v Green, 216 US App DC 329, 333; 670 F2d 1148 (1981).

Because the police could only guess about what defendant was seeking to hide, their speculation did not provide a particularized suspicion of possessory wrongdoing, but only a generalized one.

Considering the totality of the circumstances with which the police were confronted before the defendant began to run, it is clear that the officers were entirely without authority to confront the defendant and require him to submit to an investigatory stop and interrogation because, on the basis of what they had observed, the officers had

no articulable or particularized grounds to suspect, reasonably, that the defendant was, had been, or was about to be engaged in criminal activity. Nothing in their observation of him to that point provided the objectively reasonable and articulable suspicion that would justify the limited intrusion upon the defendant's liberty and privacy interests permitted under Terry.

What then was added to the picture when the defendant began to run that converted the naked and generalized suspicion of the police officers into articulable grounds to conclude that criminal activity was afoot?

Defendant's flight at the approach of police did not, by itself, in the circumstances of this case, support a reasonable suspicion. Although it is uncontroverted that flight may be a factor to be considered in ascertaining

whether there is reasonable suspicion to warrant a Terry stop, United States v Sharpe, supra; United States v Brignoni-Ponce, supra, flight alone is not a reliable indicator of guilt without other circumstances to make its import less ambiguous. United States v Green, supra, 215 US App DC 333; People v Tebedo, 81 Mich App 535; 265 NW2d 406 (1978).

Certainly it is reasonable to conclude that the defendant's flight away from the vehicle carrying the police officers might reasonably have heightened the officer's general suspicion that the defendant must have had something to hide and wished to avoid contact with the occupants of the vehicle. But heightened general suspicion occasioned by the flight of a surveillance subject does not alone supply the particularized, reasoned, articulable basis to conclude that criminal activity was afoot that is

required to justify the temporary seizure approved in Terry.

If it were otherwise, any citizen who refuses to answer a plain-clothes police officer's investigative questions during a "tier one" inquiry, and instead exercises his constitutional right to "go on his way"--at top speed--would, by the act of exercising his right to "move on," invite a full-blown tier two Terry "stop and frisk" not because of the addition of any articulable or particularized suspicion of imminent criminal activity, but because he exercised his right to the freedom of movement the Fourth Amendment guarantees.

That is what occurred here. The officers had no grounds to stop and frisk the defendant when they saw him walking on Clairmount Avenue. They then seized upon his "suspicious" act of running away from the unmarked car as providing the

articulable suspicion that criminal activity was underway. What criminal activity? What, in defendant's flight, when considered with the antecedent circumstances, provided a particularized suspicion that he was engaged in the commission of a crime?

It was clear to the officers in Terry that when Terry and his friends conducted an "elaborately casual and oft-repeated reconnaissance of the store window on Huron Road," by walking past it first in one direction then another and peering in the window, and "repeated this ritual alternately between five and six times," each time conferring with a third person stationed a short distance away, the suspects were "casing a job, a stick-up." That was the particularized and articulable suspicion of imminent criminal activity that justified the stop and frisk in Terry, and that the United

States Supreme Court declared to be a condition precedent to the constitutional validity of such limited intrusions.

If, as the United States Court of Appeals said in Green, supra, flight alone is not a reliable indicator of guilt without other circumstances because flight alone is inherently ambiguous, the ambiguity of the defendant's flight in this case is even more evident. The officers were not in uniform, they were driving an unmarked car, they did not identify themselves as police[8] and, upon first observing the defendant, they slowed their vehicle, fixed their attention on the defendant, and then pursued him. It is not unreasonable to expect that a citizen walking along the street in a high-crime area in the dark of night, who is being scrutinized and then "tailed" by three unknown persons in a "private" motor vehicle, would vacate the area at flank speed.

VI

Assessing collectively the individual factors with which the officers were confronted in dealing with the rapidly unfolding events on Clairmount Avenue, we are unable to conclude that they combined to create a totality of circumstances having any different constitutional quality or significance than did the constituent parts.

Each factor is capable of innocent interpretation, and we find the individual factors here do not build to form the requisite objective basis for the particularized suspicion required to justify a Terry stop. The police were not investigating a recently committed crime in the area which may have been linked to the defendant, nor was he known to the officers as a suspect in a crime. There was no contraband visible on defendant's person; the officers could only guess at the contents of the paper

bag. The defendant's flight from plain-clothes pursuers in an unmarked car was at most ambiguous, and at least understandable.

We conclude that the circumstances, as they appeared to the police officers on the night in question, considered in their totality, did not provide the requisite particularized suspicion based on objective observation that criminal activity was afoot sufficient to outweigh the defendant's privacy interests under the Fourth Amendment.

Because the seizure of the defendant was unreasonable, in not meeting the requirements of a Terry stop, any evidence derived from that seizure must be suppressed as fruit of the poisonous tree. Wong Sun v United States, 371 US 471; 83 S Ct 407; 9 L Ed 2d 441 (1963). We find that the weapon would not have been discovered, but for the illegal

seizure of the defendant, thus its admission into evidence was properly excluded by the courts below.

VII

The prosecutor claims that in throwing the paper bag containing the revolver to the floor in the vestibule of the building when he was seized, defendant abandoned the gun, thus cutting off his standing to claim that the evidence was illegally seized. [9] People v Kirchoff, 74 Mich App 641; 254 NW2d 793 (1977). We disagree. "Abandonment is an ultimate fact or conclusion based generally upon a combination of act and intent." Friedman v United States, 347 F2d 697, 704 (CA 8, 1965). "The proof supporting abandonment should 'reasonably beget the exclusive inference of throwing away....'" People v Howard, 50 NY2d 583, 593; 408 NE2d 908; 430 NYS2d 578 (1980). Here, it is unclear from the evidence whether

defendant actually intended to throw away the bag or to continue to conceal it by hiding it in the building vestibule. Thus, we question whether an abandonment has occurred.

Regardless whether abandonment was intended, defendant's actions cannot be used to dissipate the taint flowing from the unreasonable police conduct. Where, as here, the police activity is coercive in nature, we find that it serves to nullify any claim of abandonment. Although defendant divested himself of the bag prior to the officer's actually taking physical hold of him, the pursuit itself by the officers was effectively the seizure of the defendant. A seizure occurs when a reasonable person would have believed that he was not free to leave. United States v Mendenhall, 446 US 544; 100 S Ct 1870; 64 L Ed 2d 497 (1980); Florida v Royer, supra; Terry v

Ohio, supra. As soon as the officers began their pursuit, defendant's freedom was restricted. If he stopped running, he would not be free to leave. Events proved that. Defendant's divestment of the bag was in direct response to his unjustified seizure. Following Wong Sun v United States, supra, the fruits of the officers' illegal action are not to be admitted as evidence unless an intervening independent act of free will purges the primary taint of the unlawful invasion. In light of the coercive effect of the seizure of the defendant, we find that his divestment of the paper bag, and the revolver it contained, does not constitute an independent act sufficient to purge the primary taint of the unlawful seizure.

The Recorder's Court properly suppressed the weapon as evidence.

Affirmed.

(signed) James L. Ryan
Michael F. Cavanagh
Dorothy Comstock Riley
James H. Brickley
Charles L. Levin

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[1] Defendants last name has been spelled "Shabaz" for most of the proceedings heretofore. However, defendant, in filling out the affidavit of indigency supporting petition for counsel for appellate review, spelled his name "Shabazz."

[2] The hearing judge characterized the proceeding as "an Evidentiary Hearing to determine the legality of the seizure and/or search of an item of evidence."

[3] In Terrell a police officer in a moving police vehicle observed the defendant standing on a street corner, talking to another person. When defendant looked in the direction of the police vehicle, he put his hand in his

pocket and began to run toward a nearby apartment building. The officer gave chase on foot because he believed "there could possibly be a gun in Mr. Terrell's pocket...." Id at 678. According to the officer, the defendant, on reaching the apartment building, removed a coin envelope from his pocket and dropped it on the floor. The officer retrieved the envelope, determined that it contained suspected heroin, and arrested the defendant for possession of narcotics.

The Court of Appeals affirmed the trial court's order suppressing the evidence as having been obtained in violation of the defendant's right under the Fourth Amendment of the United States Constitution, because "[a] totality of facts and circumstances which could provide the officer with a reasonable belief that criminal activity may be afoot was simply lacking." The Court of

Appeals added:

> "Defendant's furtive gestures may have aroused the police officer's general suspicions, but without some additional specific knowledge on the part of the officer they were insufficient to justify an intrusion." Id. at 680.

[4] Michigan's analogous provision, Const 1963, art 1, Sec. 11, reads:

> "The person, houses, papers, and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or thing shall issue without describing them, nor without probable cause, supported by oath or affirmation."

[5] Although Justice White's opinion was not adopted by a majority of the Court, we find this part of his opinion to be a correct and helpful analysis and summary of prior United States Supreme Court Fourth Amendment rulings.

[6] The essential underpinnings of the Terry decision--the police officers' reasonable suspicion that he may be dealing with a "armed and dangerous" person; that "nothing in the initial

stages of [his main] encounter serves to dispel his reasonable fear for his own or others' safety"; and that he is entitled to "conduct a carefully limited search ... in an attempt to discover weapons" -- have eroded with time and are no longer conditions precedent to justify a Terry stop. Subsequent Supreme Court decisions have ignored the "search for dangerous weapons" requirement of Terry and now permit the same kind of limited intrusions upon a citizen's liberty interests under what are called "special law enforcement needs." See United States v Sharpe, supra. In addition to the need to disarm an "armed and dangerous person to assure the safety of the police officers and others," Terry, supra; Adams v Williams, 407 US 143; 92 S Ct 1921; 32 L Ed 2d 612 (1972), "Terry stops" have been approved in order to conduct border searches for illegal aliens, United

States v Cortez, supra; United States v Brignoni-Ponce, supra; to conduct airport searches for suspected drug trafficking, Royer, supra; United States v Place, 462 US 696; 103 S Ct 2637; 77 L Ed 2d 110 (1983); United States v Mendenhall, supra; stops to investigate past felonies, United States v Hensley, ___US___; 105 S Ct 675; 83 L Ed 2d 604 (1985), and transportation of large quantities of drugs, United States v Sharpe, supra.

[7] At oral argument, the assistant prosecuting attorney stated that, as the Court of Appeals stated in this case, the parties are in agreement that an investigatory pursuit is governed by the principles of Terry v Ohio, and the comparable Michigan authority.

[8] Following Wong Sun v United States, 371 US 471, 482; 83 S Ct 407; 9 L Ed 2d 441 (1963), where the officers fail to

identify themselves, the suspect's flight must be regarded as ambiguous conduct.

[9] Although the assistant prosecutor conceded at oral argument that if the seizure were found to be unreasonable defendant could not be charged with the contents of the bag, she has argued the issue on abandonment in her brief. Therefore, we address it here.

7/March 1985

STATE OF MICHIGAN

SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v No. 72567

ASKIA KAHIL [sic] SHABAZ,

Defendant-Appellee.

BOYLE, J. (dissenting).

This case presents two issues. The first issue is whether the initial contact between the police and the citizen in this case constituted a

"seizure" within the ambit of the protections afforded by the Fourth Amendment of the United States Constitution, against such activity. [1] The second issue is whether the officers conduct was reasonable, assuming the applicability of the Fourth Amendment, Terry v Ohio, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1986), when judged by the totality of circumstances at the time of the incident, United States v Cortez, 449 US 411; 101 S Ct 690; 66 L Ed 2d 621 (1981).

The first issue has not yet been authoritatively resolved by any decision of this Court or of the United States Supreme Court. It was foreshadowed almost twenty years ago by Justice Harlan's concurrence in Terry, supra. Writing separately, "to fill in a few gaps, as I see them, in (the majority) opinion" at 31-32, Justice Harlan stated:

"In the first place, if the frisk

> is justified in order to protect the officer during an encounter with a citizen, the officer must first have constitutional grounds to insist on an encounter, to make a forcible stop. Any person, including a policeman, is at liberty to avoid a person he considers dangerous. If and when a policeman has a right instead to disarm such a person for his own protection he must first have a right not to avoid him but to be in his presence."

Despite Justice Harlan's prescient observation, the opinions in Terry and the companion cases focused[2] attention on the pat down of Mr. Terry, and the pocket searches of the defendants in the companion cases. As Professor LaFave has noted:

> "The failure of the majority to heed [Justice Harlan's] advice, it would seem, was unwise, for the Court thereby detoured around the threshold issue about stop and frisk, one on which courts, lawyers and police deserve guidance." LaFave, Search and Seizure, Sec. 9.3, p 64.

Research has disclosed only two United States Supreme Court cases[3] providing guidance for resolution of whether the

conduct here constituted a stop.

In United States v Mendenhall, 446 US 544; 100 S Ct 1870; 64 L Ed 2d 497 (1980), the Court considered whether a "seizure" had taken place when agents approached the defendant in an airport concourse and asked questions of her. In concluding that it had not, two justices noted that the Court in Terry had apparently and correctly assumed that a seizure had not taken place before the officer physically restrained Terry for purposes of searching his person for weapons. Mendenhall, supra at 552-553. The Justices stated:

> "We adhere to the view that a person is seized only when, by means of physical force or a show of authority, his freedom of movement is restrained. Only when such restraint is imposed is there any foundation whatever for invoking constitutional safeguards." Id at 553.

Analyzing the facts, Justices Stewart and Rehnquist observed that the events took place in a public concourse, the

agents wore no uniforms and displayed no weapons, they did not summon the respondent to their presence, but instead approached her and identified themselves as federal agents. "Such conduct, without more, did not amount to an intrusion upon any constitutionally protected interest."[4] Id. at 555.

In Immigration and Naturalization Service v Delgado, ____US____; 104 S Ct 1758; 80 L Ed 2d 247 (1984), an action for injunctive and declaratory relief was brought by employees and their union, seeking to prevent the Immigration and Naturalization Service from conducting "factory surveys" of the work force at a garment factory. Applying Mendenhall, supra, the Court of Appeals for the Ninth Circuit held that the stationing of agents at the doors to the buildings during the one to three hours that other agents approached workers and asked questions about employee citizenship

constituted a seizure of the entire work force because "a reasonable worker 'would have believed that he was not free to leave,'" Int'l Ladies' Garment Workers Union v Sureck, 681 F2d 624, 634 (CA 9, 1982). Consequently the Court of Appeals held that individual questioning of the employees violated the Fourth Amendment because there had been no reasonable suspicion or probable cause as to any of them.

In reversing the Court of Appeals, the majority held that interrogation relating to one' identity or a request for identification does not by itself constitute a Fourth Amendment seizure, despite the claim that the manner in which the surveys were conducted created a psychological environment which made the employees reasonable afraid they were not free to leave.

Justices Brennan and Marshall, concur-

ring in part and dissenting in part, believed that the employees were seized within the meaning of the Fourth Amendment when they were "accosted by the INS agents and questioned" by them in circumstances which "demonstrated a 'show of authority'...[that would] overbear the will of any reasonable person."[5]

While neither Mendenhall nor Delgado dispose of the issue presented here, they do illustrate that the Court has applied the test of a reasonable apprehension of a citizen not to be free to go, only to determine whether an actual confrontation between a citizen and the police for interrogation purposes has become a seizure requiring further justification. See also Brown v Texas, 443 US 47; 99 S Ct 2637; 61 L Ed 2d 357 (1979).

I would conclude that on this record there was not an intrusion on protected interests sufficient to constitute a

stop. While the reasonable belief of an individual actually stopped by the police is relevant to whether a seizure has occurred, the threshold issue, whether there has been a "stop," is one of law. I would find on this record that one individual running after another is, as a matter of law, not a detention for investigation. The defendant's flight prevented any request for an explanation of his behavior. On these facts, not even a "forcible stop," Terry, supra (Harlan, J., concurring), triggering Fourth Amendment protection had occurred before the defendant discarded the bag.

II

Even if running after the defendant was a "stop", it is clear that the seizure was justified by a reasonable suspicion, based on objective facts, that the defendant was involved in criminal activity.

Since Terry v Ohio, supra, the Court has determined the propriety of Terry-type activity by balancing the extent of the intrusion on the individual's rights against the right of the public to be free from criminal activity. Terry v Ohio, supra; Adams v Williams, 407 US 143; 92 S Ct 1921; 32 L Ed 2d 612 (1972), supra; United States v Brignoni-Ponce, 422 US 873; 95 S CT 2574; 45 L Ed 2d 607 (1975).

In his Mendenhall concurrence, Justice Powell, joined by Chief Justice Burger and Justice Blackmun, determined that the initial stop of the defendant was a stop protected by the Fourth Amendment, but that the stop was reasonable. Mendenhall, supra, at 560-566. Justice Powell wrote that, "[t]he jurisprudence of the Fourth Amendment demands consideration of the public's interest in effective law enforcement as well as each person's

constitutionally secured right to be free from unreasonable searches and seizures." Id. p 565. After balancing the public interest against the extent of the intrusion, in light of all the circumstances of the case, Justice Powell concluded that the stop was reasonable.

There can be no debate that unlawful use of handguns constitute a serious threat to public safety. According to figures compiled by the Federal Bureau of Investigation, firearms were responsible for sixty percent of the 18,692 murders and nonnegligent manslaughters committed nationwide in 1984. The FBI also reports that firearms were used in thirty-six percent of the 485,008 robberies committed in 1984. According to the Detroit Police Department, in the first six months of 1985, firearms were responsible for 157 homicides in Detroit alone.

Balanced against the public's right to be free from the employment of firearms for criminal use, is the limited nature of the intrusion on the defendant in this case.[6] A pursuit in the attempt to stop to ascertain whether or not a weapon is being concealed is a minuscule intrusion when weighed against the havoc cause by weapons.

Applying the balancing test first articulated in Terry, the United States Supreme Court has approved a forcible stop to investigate an informant's tip that the suspect was armed and carrying narcotics, Adams v Williams, supra, a brief stop of a moving vehicle to investigate a reasonable suspicion that its occupants were involved in criminal activity, United States v Brignoni-Ponce, supra, and a temporary detention of the occupant of a house while a search warrant for the house was being executed,

Michigan v Summers, 452 US 692; 101 S Ct 2587; 69 L Ed 2d 340 (1981). Most recently the court has approved an investigative stop based on a reasonable suspicion of past criminal activity, United States v Hensley, 469 US___; 105 S Ct 675; 83 L Ed 2d 604 (1985).

Moreover, since Terry, the Supreme Court has consistently held that the "reasonable suspicion" required for a valid investigative stop must be judged by the totality of the circumstances at the time of the incident. As the majority observes, this totality has been specifically held to include the experience and heightened perceptions of the police officers involved, United States v Cortez, supra.

It is true that flight alone cannot give rise to probable cause, since, were it otherwise, anyone who does not desire to talk to the police and who either

walks or runs away from them would always be subject to legal arrest. LaFave, Search and Seizure, Sec 3.6, p 669.

It is also true that concealment itself may be insufficient to justify a stop. Id. The majority has not, however, set forth authority justifying the conclusion that, in combination, the observation by experienced police officers of concealment and flight may not provide a reasonable suspicion that criminal activity is occurring. Indeed, the case cited by the majority, United States v Green, 216 US App DC 329; 670 F2d 1148 (1981), not only does not support the conclusion of the majority that the officers had only a generalized suspicion, it is actually a holding that the officers' observation of activity typical of a narcotics transaction, the concealment of a brown paper bag and the flight and evasion by defendant when

approached by an unmarked police car, constituted probable cause for arrest. Id. at 332.

The majority has discredited the inference which reasonable police officers might draw and has bifurcated the circumstances to conclude that the sum of the circumstances is not "greater than the sums of their parts." (Slip op p 12.)

The purported justification for their conclusion is that each circumstance may have been innocent. This analysis obscures the significance of the officers' experience and renders the totality of circumstances test meaningless. As the United States Court of Appeals for the Ninth Circuit noted in United States v Holland, 510 F2d 453, 455 (CA 9, 1975);

> "Clearly, the officers were not required to rule out all possibility of innocent behavior before initiating a brief stop...The test

> is founded suspicion...Even if it was equally probable that the vehicle or its occupants were innocent of any wrongdoing, police officers must be permitted to act before their reasonable belief is verified by escape or fruition of the harm it was their duty to prevent."

See also United States v Viegas, 639 F2d 42 (CA 1, 1981), and United States v Black, 675 F2d 129 (CA 7, 1982).

The defendant in this case was seen by two experienced police officers[7] in a high-crime area, late at night, leaving a building in which one of the officers had previously made over fifteen arrests for concealed weapons and narcotics offenses. Upon leaving the building, the defendant was seen "stuffing a paper bag like under his vest" or "in his pants." After seeing the two officers stop their vehicle, the defendant began running down the street. At this point, the officers began pursuit.[8]

We would conclude that any "seizure" of defendant here was based on reasonable

suspicion and that the seizure of the bag was therefore justified. The bag was observed by the officer in plain view in a place where he had a lawful right to be, Harris v United States, 390 US 234; 88 S Ct 992; 19 L Ed 2d 1067 (1968).

I would reverse and remand to the trial court.

(signed) Patricia J. Boyle

G. Mennen Williams

[1] The prosecuting attorney in this case has conceded that the police officers' conduct involved Fourth Amendment activity and, as such, is governed by the standards for investigative detention set forth in Terry v Ohio, 392 US 1; 88 S Ct 1868; 20 L Ed 2 889. However, we are not bound by the prosecutor's interpretation of the case and may consider and analyze the facts and issues independent of such a concession. The United States Supreme

Court in one of the companion cases to Terry, Sibron v New York, 392 US 40, 58-59; 88 S Ct 1889; 20 L Ed 2 917 (1968), disregarded the state's representation of error and decided the case on its merits, noting:

> "'[O]ur judgments are precedents, and the proper administration of the criminal law cannot be left merely to the stipulation of the parties.' ...For us to accept his view blindly...would be a disservice to the State of New York and an abdication of our obligation to lower courts to decide cases upon proper constitutional grounds in a manner which permits them to conform their future behavior to the demands of the Constitution."

[2] Sibron v New York, supra.

[3] At least two other state jurisdictions have considered, and come to different conclusions about, whether there was a seizure in cases with facts similar to those in the instant case. Compare State v Saia, 302 So 2d 869 (LA, 1974)(seizure), with State v Sheffield, 62 NJ 441; 303 A2d 68 (1973)(no seizure).

[4] Concurring Justices Powell and

Blackmun and the Chief Justice did not reach the issue as to whether the initial stop was a seizure.

> "For me, the question whether the respondent in this case reasonably could have thought she was free to 'walk away' when asked by two Government agents for his driver's license and ticket is extremely close." Id. at 560.

5 See also United States v Barnes, 496 A2d 1040 (DC App, 1985)(no seizure where police officers approached defendant on the street, asked two questions, and requested that defendant remove his hands from his pockets).

6 The limited intrusion in this case is especially apparent when considering what is not involved here. The officers did not search the defendant's home or car, nor did they even conduct a search of the defendant. Nor was there any interrogation.

7 Although courts have sometimes been concerned in cases such as this that police may unconstitutionally stop a

citizen and then later seek to justify their actions with fabricated or unsubstantiated facts (see Landynski, The Supreme Court's search for Fourth Amendment standards: The problem of stop and frisk, 45 Conn B J 146 [1971]), in this case it is important to note that there is no indication that the events did not happen exactly as the officer related them. In fact, the trial court specifically found the testimony of Officer Surma to be highly credible.

8 A recent decision of thew United States Supreme Court, United States v Sharpe, ___US___; 105 S Ct 1568; 84 L Ed 2d 605 (1985), not only supports the observation by the majority "that flight may be a factor: (slip op p 13) in the determination of reasonable suspicion, but also offers instruction on the proper disposition of the instant case.

In Sharpe, an agent of the Drug

Enforcement Administration (DEA) notice a pickup truck with an attached camper traveling on the highway in tandem with another vehicle. After observing that the truck was riding low in the rear, that the camper did not sway or bounce when the truck drove over bumps or around curves, and that quilted material covered the rear and side windows of the camper, the DEA agent followed the vehicles for approximately twenty miles as they proceeded into South Carolina. At this time, the agent decided to make an investigative stop and contacted the state police for assistance. After the police officers signaled the lead car to stop, the pickup truck cut between the car and the patrol vehicle and continued down the highway. The state police pursued the truck and finally stopped it about on-half mile down the road. When the DEA agent arrived, he investigated

further and, finding that the truck did not sink when he stepped on the back and that there was a strange smell emanating from the camper windows, he opened the rear door and found bales of marijuana. The Sharpe Court upheld the detention and search, holding that there was no violation of the Fourth Amendment.

The majority concluded that the Court of Appeals assumption that the police had an articulable and reasonable suspicion that defendants were engaged in marijuana trafficking, given the setting and all the circumstances when the police attempted to stop the vehicles, was abundantly supported by the record. The factors were noted as follows: the agents observed the vehicles in an area known to be frequented by drug traffickers; the pickup truck was a type used to transport marijuana; the truck appeared to be heavily loaded and its windows were covered with bed sheet material, the

vehicles took evasive actions and started speeding when the officer began to follow them in his marked car. The court noted: "Perhaps none of these facts, standing alone, would give rise to a reasonable suspicion; but taken together as appraised by an experienced law enforcement officer, they provided clear justification to stop the vehicles and pursue a limited investigation." Id., 105 S Ct 1573-1574.

Justice Marshall's concurrence and Justice Brennan's dissent also shed light on the correct resolution of this case. Justice Marshall concurred because "the evasive actions of the defendants here turned what otherwise would have been a permissibly brief Terry stop into the prolonged encounter now at issue." Id., 105 S Ct 1577.

Justice Brennan, dissenting because the Court was making a de facto factual determination of evasiveness, also

engaged in discussion instructive for our present purposes:

> "I had thought it rather well established that where police officers reasonable suspect that an individual may be engaged in criminal activity, and the individual deliberately takes flight when the officers attempt to stop and question him, the officers generally no longer have mere reasonable suspicion, but probable cause to arrest. See, e.g., Peters v New York, decided together with Sibron v New York, 392 US 40, 66-67, companion case to Terry ('deliberately furtive actions and flight at the approach of strangers or law officers are strong indicia of mens rea, and when coupled with specific knowledge on the part of the officer relating the suspect to the evidence of crime, they are proper factors to be considered in the decision to make an arrest')."

While this case does not involve a question whether knowledge of the officer was sufficiently specific to constitute probable cause when combined with flight, as the most recent discussion of the Court, Sharpe is notable as suggesting that there is no basis in the opinions of the United States Supreme Court for the decision reached today.

Supreme Court, U.S.
FILED
FEB 19 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1265 (2)

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

THE PEOPLE OF THE STATE OF MICHIGAN
Petitioner

vs.

ASKIA KHALIL SHABAZ,
Respondent

RESPONDENT'S REPLY TO PEOPLE OF THE STATE OF MICHIGAN PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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14 pp

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. IS THE FOURTH AMENDMENT IMPLICATED WHEN PLAIN CLOTHES POLICE OFFICERS IN AN UNMARKED CAR EXIT THE VEHICLE AND CHASE AN INDIVIDUAL AS TO WHOM THEY HAVE NO PROBABLE CAUSE OR REASONABLE SUSPICION WHO IS UNAWARE THAT THE MEN ARE POLICE OFFICERS YET TO WHOM IT IS APPARENT THAT HE WILL NOT BE ALLOWED TO LEAVE FREELY?

II. IF THE ANSWER TO QUESTION I IS THAT THE PURSUIT ITSELF REQUIRES SOME LEVEL OF CAUSE, IS THE FACT THAT RESPONDENT RAN FROM AN UNMARKED CAR WHICH CONTAINED THREE INDIVIDUALS DRESSED IN STREET CLOTHES WHICH SLOWED DOWN AS IT APPROACHED SUFFICIENT TO SUPPLY THE NECESSARY LEVEL OF CAUSE?

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Supreme Court Rule 17 4

IN THE SUPREME COURT OF THE UNITED STATES
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-VS-

ASKIA KHALIL SHABAZ,
Respondent

RESPONDENT'S REPLY TO PEOPLE OF THE STATE OF MICHIGAN PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

NOW COMES Askia Khalil Shabaz, Respondent herein, by his attorney, GERALD M. LORENCE, and prays that the Petition for Writ of Certiorari to the Supreme Court of the United States filed by the People of the State of Michigan be denied for the reasons herein stated:

OPINIONS BELOW

The opinion of the Michigan Court of Appeals is unreported and is appended as Appendix A to the People's Petition for Certiorari. The Opinion of the Michigan Supreme Court is reported as 424 Mich 42 (1985) and is appended as Appendix B to the People's Petition for Certiorari.

STATEMENT OF JURISDICTION

The judgment of the Michigan Court of Appeals was entered on August 12, 1983. The judgment of the Michigan Supreme Court was entered on December 4, 1985. The jurisdiction of this Court is invoked under 28 USC Sec 1257 (3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Defendant-Respondent was charged with carrying a concealed weapon, and bound over for trial following a preliminary examination. A Motion to Suppress the Evidence and Quash the Information was heard and granted by the trial court. The Michigan Court of Appeals affirmed the trial court when the Prosecutor-Petitioner appealed the dismissal of the charge. The Michigan Supreme Court granted the Prosecutor-Petitioner's Application for Leave to Appeal on February 28, 1984 and affirmed the Court of Appeals on December 4, 1985.

The charge arose out of the following incident. On July 22, 1982, three police officers in plain clothes were in an unmarked car travelling on Clairmount west of Woodward Avenue in the City of Detroit. Officer Kenneth Surma, the only witness at the evidentiary hearing, testified that they

saw Respondent exit an apartment building on Clairmount just west of Woodward Avenue. They had no information concerning Respondent or any crime involving a person of the description of Respondent. Respondent was not wearing an outer coat. He was allegedly observed to look in the direction of the police officers' car, which was travelling on the public street. The Respondent was observed stuffing a paper bag, about the size of a lunch bag, into his waistband. As the unmarked police car approached Respondent, he was observed to begin running toward Woodward Avenue. Two of the plainclothes officers got out of the unmarked police car and chased him. The officer testified that he had no information that Respondent had or was about to commit a crime, but that the running made him "suspicious". The Respondent turned right at Woodward Avenue and ran through a doorway into a vestibule and was still being pursued inside these premises by the officers. The Respondent turned to leave the doorway and was grabbed by the first pursuing officer and then a few seconds later by his partner. One of the officers recovered the paper bag which was found to contain a gun. During the entire incident, up to the time of his being grabbed, the Respondent was never told or informed by his observers and pursuers that they were police officers or that he should stop.

The officers testified that the area in which Respondent was seen was an area that had narcotics, weapons and prostitution problems. No foundation was laid for the officers' allegations, by criminal statistics or other such testimony. The officer indicated that there was a supermarket in the area of the incident, and people bring things out of the supermarket in similar bags.

REASONS WHY THE CAUSE SHOULD NOT BE REVIEWED BY THIS COURT

Respondent, defendant below, submits that the issues, presented in the Petition were correctly decided by the

Michigan courts in a manner consistent with the applicable decisions of this Court. Thus, under Supreme Court Rule 17, this tribunal should decline to hear this matter.

Petitioner would ask this Court to abrogate a citizen's right to walk away from a police officer, (or virtually any person who may possibly be a police officer) by holding that an "investigative pursuit" and subsequent stop does not fall within the purview of Fourth Amendment activity. The "investigative pursuit" in this matter occurred when three police officers, dressed in street clothes, exited an unmarked car and chased Respondent.

Of the three officers involved, only one, Kenneth Surma, testified at the evidentiary hearing. According to Officer Surma's testimony, Respondent was observed walking down a public street on a summer night and putting a non-descript bag into his waistband. When the strange, unmarked car approached Respondent and slowed down, he began to run. Officer Surma further testified that they knew nothing else about the man they chased and did not identify themselves as police officers until after he was caught.

In *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct 1868, 20 L. Ed 2d 889 (1968), the majority of the Court set forth the primary concept of when a police-citizen contact reaches Fourth Amendment proportions:

> It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person. 392 U.S. at 16, 88 S. Ct. at 1868, 20 L. Ed. 2d. at 889.

Justice White, writing separately, and concurring, set forth the concept of police-citizen contact that was envisioned in the *Terry* concept:

> There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets. Absent special circumstances, the person

> approached may not be detained or frisked *but may refuse to cooperate and go on his way.* 392 U.S. at 34. 88 S. Ct. at 1868, 20 L. Ed. 2d at 889 (emphasis added)

In *United States v. Mendenhall,* 446 U.S. 544, 100 S. Ct. 1870, 64 L. Ed 2d 497 (1980), cited by the Petitioner, Justice Stewart, in an opinion joined by Justice Rehnquist, stated:

> We conclude that a person has been "seized within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.[6] Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. *See Terry v. Ohio,* 392 U.S. 1, 19 n.16, 88 S. Ct at 1879 n. 16; *Dunaway v. New York,* 442 U.S. 200, 207, and n. 6, 99 S. Ct 2248, 2253, 60 L. Ed 2d 824 (1979)

In defining the degree of probability of criminal conduct necessary to justify Fourth Amendment activity, this Court in *Brown v. Texas,* 443 U.S. 47; 99 S. Ct. 2637 (1979) held that a person may be stopped only if the officers have objective facts which would lead a person of ordinary prudence to a reasonable suspicion that the individual is involved in criminal activity. In *Brown, supra,* a suspicious looking defendant was stopped by officer who wished to ascertain his identity after observing him and another man walk away from each other in an alley of an area with a high incidence of drug traffic. In holding the stop of Brown to be an unreasonable seizure, Chief Justice Warren Burger, writing for the Court, stated: "The Fourth Amendment requires that a sei-

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[6] We agree with the District Court that the subjective intention of the DEA agent in this case to detain the respondent, had she attempted to leave, is irrelevant except as it may have been conveyed to the respondent." 446 U.S. at 554-555, 100 S. Ct. at 1874, 64 L. Ed 2d at 509

zure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." *Brown* at 51. The Chief Justice continued: "The flaw in the State's case is that none of the circumstances preceding the officers' detention of appellant justified a reasonable suspicion that he was involved in criminal conduct . . . The fact that Appellant was in a neighborhood frequented by drug users, standing alone, is not a basis for concluding that appellant himself was engaged in criminal conduct. In short, the appellant's activity was no different from the activity of other pedestrians." *Brown* at 51-52. Citing the balance between personal liberty and police work Justice Burger stated:

> In the absence of any basis for suspecting appellant of misconduct, the balance between the public interest and appellant's right to personal security and privacy tilts in favor of freedom from police interference. The Texas statute under which appellant was stopped and required to identify himself is designed to advance a weighty social objective in large metropolitan centers: prevention of crime. But even assuming that purpose is served by some degree by stopping and demanding identification from an individual without any specific basis for believing he is involved in criminal activity, the guarantees of the Fourth Amendment do not allow it. When such a stop is not based on objective criteria, the risk of arbitrary and abusive police practices exceeds tolerable limits. *See Delaware v. Prouse,* (440 U.S. 648) at 661, 99 S. Ct. 1391, 59 L.Ed 2d 660, 661 (1979)

In *Florida v. Royer,* 460 U.S. 491, 103 S. Ct 1319, 75 L. Ed 2d 229 (1983), Justice White, in an opinion joined by Justices Marshall, Powell and Stevens, stated:

> (L)aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the

> street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions. See *Dunaway v. New York*, (442 U.S. 200) at 210, n. 12, 98 S. Ct. 2248, 60 L. Ed 2d 824; *Terry v. Ohio*, 392 U.S. at 31, 32-33, 88 S. Ct. 1868, 20 L Ed 2d 889 (Harlan, J. concurring); *Id.*, at 34, 88 S. Ct. 1868 20 L Ed 2d 889 (White J., concurring). Nor would the fact that the officer identifies himself as a police officer, without more, covert the encounter into a seizure requiring some level of objective justification. *United States v. Mendenhall*, 446 U.S. 544, 555, 100 S. Ct 1870, 64 L. Ed 3d 497 (opinion of Stewart, J.). The person approached, however, need not answer any question put to him; indeed he may decline to answer the questions at all and may go on his way. *Terry v. Ohio*, 392 U.S. at 32-33, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (Harlan, J., concurring). He may not be detained, even momentarily, without reasonable, objective grounds for doing so; and his refusal to listen does not, without more, furnish those grounds, *United States v. Mendenhall*, supra at 556, 100 S. Ct. 1870, 64 L. Ed. 2d 497, (opinion of Stewart, J.). 460 U.S. at 497-498, 103 S. Ct. 1319, 75 L. Ed 2d at 236

The decisions of this Court make it clear that while every police-citizen contact is not Fourth Amendment activity, when officers act in a manner which communicates to the citizen that he is not free to leave, a seizure of constitutional magnitude has taken place. Notwithstanding the ultimate grabbing of Respondent, it is apparent that at the outset of the chase, he was not free to leave. Respondent was, therefore, technically seized at that time.

Whether the officers had enough reasonable suspicion to justify their actions was properly determined by the Michigan Surpeme Court which concluded that they did not. Pursuit, by police officers, of a citizen about whom they know nothing other than that he has placed a non-descript paper

bag in his waistband and that he runs from the sight of strangers (whom he did not know were police officers) is not the "kind of police work suggested by judges and scholars as examples of appropriate and reasonable law enforcement . . . (where) . . . [F]act on fact and clue on clue afforded a basis for the deductions and inferences that brought the officers to focus on (Respondent). *United States v. Cortez*, 449 U.S. 411, 101 S. Ct. 690, 66 L. Ed 2d 621 (1981). It represents, at best, the playing of a "hunch" by police officers based only upon seeing a man with a bag.[1]

To say that the police, without identifying themselves as such (or without being in identifying uniforms or cars) may pursue a citizen about whom they have only a suspicion, is to make the right of a citizen to walk away and not respond to the police a meaningless right, and could, by pure logic, increase the fear of citizens on the street who are approached by suspicious strangers; are they criminals or policeman? Can I leave or will that make me suspicious and vitiate my right to walk away?

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[1] This Court has long recognized the difficulty of police contact with citizens based upon what they may be seen to be carrying in a package. In *Henry v. United States*, 361 U.S. 98, 104, 80 S. Ct 168, 4 L. Ed. 2d 134 (1959), Justice Douglas, writing for the majority of the Court, stated, after providing a thoughtful discourse on the historial roots of the Fourth Amendment, 361 U.S. at 100-102, stated:

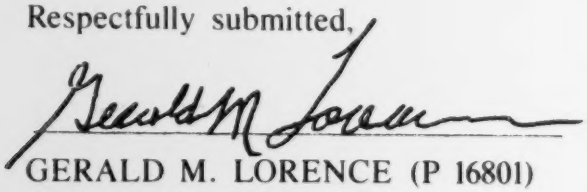
> "The fact that packages have been stolen does not make every man who carries a package subject to arrest nor the package subject to seizure. The police must have reasonable grounds to believe that the particular package carried by the citizen is contraband. Its shape and design might at times be adequate. The weight of it and the manner in which it is carried might at times be enough. But there was nothing to indicate that the cartons here in issue probably contained liquor. The fact that they contained other contraband appeared only some hours after the arrest. What transpired at or after the time the car was stopped by the officers is, as we have said, irrelevant to the narrow issue before us. To repeat, an arrest is not justified by what the subsequent search discloses. Under our system suspicion is not enough for an officer to lay hands on a citizen. It is better, so the Fourth Amendment teaches, that the guilty sometimes go free than that citizens be subject to easy arrest." 361 U.S. at 104, 80 S. Ct. at 170, 4 L. Ed. 2d at 134.

For these reasons, Respondent submits that the present case was properly decided by the Michigan Supreme Court, and does not present an important question of federal law which has not been, but should be, settled by this Court, and Respondent would respectfully pray that the Petition for Certiorari filed by the People of the State of Michigan be denied.

CONCLUSION

It is respectfully submitted that, for the reasons outlined above, plenary review should not be granted in this case and the Petition for Writ of Certiorari to the Supreme Court of the State of Michigan filed by the People of the State of Michigan should not be granted.

Respectfully submitted,



GERALD M. LORENCE (P 16801)
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Dated: Detroit, Michigan
February 18, 1986

Supreme Court, U.S.
FILED
MAY 12 1986
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 85-1265

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1985

THE PEOPLE OF THE STATE OF MICHIGAN
Petitioner

vs.

ASKIA KHALIL SHABAZ
Respondent

ON WRIT OF CERTIORARI
TO THE MICHIGAN SUPREME COURT

JOINT APPENDIX

WAYNE COUNTY PROSECUTOR'S OFFICE
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PETITION FOR CERTIORARI FILED JANUARY 21, 1986
CERTIORARI GRANTED MARCH 31, 1986

5-7-86

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DOCKET ENTRIES

1982

July 10 Complaint and warrant filed, defendant arraigned on the warrant.

July 22 Preliminary examination held; defendant bound over for trial.

July 22 Waiver of arraignment on the information filed.

Sept. 3 Motion to Quash the Information or in the alternative for an Evidentiary Hearing to Suppress the Evidence. Hearing rescheduled for October 8, 1982.

Oct. 8 Order suppressing evidence, quashing information and dismissing case filed.

Nov. 24 Claim of Appeal filed.

Dec. 20 Appellant's Brief, and Motion to Extend Time filed.

1983

Jan. 25 Defendant-Appellee's Brief on Appeal filed.

Jan. 27 Case noticed for submission.

June 7 Case submitted; oral argument.

Aug. 12 Opinion affirming trial judge released by Court of Appeals

Sept.16 Delayed Application for Leave to Appeal filed.

Oct. 19 Answer in Opposition to Delayed Application for Leave to Appeal filed.

DOCKET ENTRIES

1984	
Feb. 28	Order granting Application for Leave to Appeal granted by Michigan Supreme Court.
May 14	Appellant's Brief on Appeal filed.
Aug. 24	Motion to dismiss by Defendant-Appellee denied by Order of Michigan Supreme Court.
Oct. 7	Appellee's Brief on Appeal filed.
1985	
July 15	Motion for Leave to file a Supplemental Brief by Plaintiff-Appellant denied by Order of Michigan Supreme Court.
Dec. 4	Opinion affirming Court of Appeals released by the Michigan Supreme Court.

PRELIMINARY EXAMINATION TRANSCRIPT

STATE OF MICHIGAN
IN THE 36TH DISTRICT COURT
OF THE CITY OF DETROIT

PEOPLE OF THE STATE OF MICHIGAN

VS

ASKIA KHALIL SHABAZZ,

Defendant

DISTRICT COURT FILE NO. 82-63440
RECORDER'S COURT FILE NO. 82-04424

BEFORE THE HON. LOUIS F. SIMMONS, JR.,

JUDGE, Detroit, Michigan, Thursday,

July 22, 1982

APPEARANCES:

MR. MICHAEL LEHTO, Assistant Prosecuting Attorney On behalf of the People

MR. THOMAS E. BETZ, Attorney at Law
On behalf of the Defendant.

Donna K. Sherman, CSR 2691
Official Court Reporter

PRELIMINARY EXAMINATION TRANSCRIPT

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PRELIMINARY EXAMINATION TRANSCRIPT

(3) Detroit, Michigan
Thursday, July 22, 1982

PROCEEDINGS

THE CLERK: Case No. 82-63440, People of the State of Michigan versus Askia Khalil Shabazz. Charge is carrying a concealed weapon, pistol on person.

MR. BETZ: Thomas Betz appearing on behalf of Askia Khalil Shabazz, we move for the sequestration of all witnesses.

KENNETH SURMA,

was called as a witness herein, and after having been first duly sworn to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LEHTO:

Q. Tell us your name and occupation.

PRELIMINARY EXAMINATION TRANSCRIPT

A. Kenneth Surma, Detroit Police Officer.

Q. Were you working as a police officer on July 10, 1982 at about 9:15 p.m.?

A. I was, sir.

Q. On that date and time were you near 9037 Woodward in the City of Detroit?

A. I was.

Q. What were you doing in the area?

A. We were in the area of Woodward, Claremont area checking (4) for narcotic activity working plain-clothes, unmarked car.

Q. Were you in your car when you saw someone exit a building with a paper bag?

A. Yes, I did.

Q. What happened at that time?

A. My partner, Officer Skotski, was driving the scout car westbound on Claremont from Woodward. We observed the defendant sitting at counsel's table in the grayish shirt and gray

slacks exit 60 Claremont, which is a known narcotics pad.

MR. BETZ: Objection, your Honor, hearsay as to whether it's a known narcotics pad or not.

THE COURT: Sustained.

MR. LEHTO: Indicating for the record the witness has identified the defendant, Askia Shabazz.

Q. (By Mr. Lehto) Now, what happened as the defendant exited this building.

A. He had looked in our direction and started stuffing a paper bag, like, under his vest. As we were slowing down, he looked in our direction again and immediately started running east on Claremont to Woodward. I pursued the subject, and he ran to 9037 Woodward, which is a stairway to an apartment building, and threw the paper bag in the corner there. As he

was coming out of the doorway, I was standing there. He tried to push his way back away from me. (5) I grabbed him, and my partner, Officer Hayes, subdued him and retrieved the bag, which contained a .357 Magnum.

Q. What did you do with the gun?

A. I confiscated it, unloaded it, asked him if he had a permit. He stated, no, and I placed him under arrest for CCW.

Q. Would you describe the gun more specifically?

A. It was a Smith & Wesson four inch blue steel revolver, .357.

Q. How long had you been working in this area?

A. Approximately, 11 years.

Q. What's your familiarity with this particular building that the defendant was at when he came out?

A. We had complaints --

MR. BETZ: Objection, which building, there are two buildings involved here.

Q. (By Mr. Lehto) There was a building that this defendant came out of?

A. 60 Claremont.

Q. That building, what's your familiarity with that building?

A. We've had complaints on it on narcotics activities. We've made other arrests in that area for narcotics and concealed weapons.

Q. Does anybody live at that building? What kind of building is it?

(6)

A. It's an old apartment building.

Q. Is it vacant or occupied?

A. It's an occupied dwelling.

MR. LEHTO: Your witness.

PRELIMINARY EXAMINATION TRANSCRIPT

CROSS EXAMINATION

BY MR. BETZ:

Q. This building on 60 Claremont, how many stories high is it?

A. I believe it's four.

Q. Do you have any idea how many dwelling units there are in this building?

A. Not offhand exactly, no, sir.

Q. You said, "We have made a number of arrests there for carrying concealed weapons and narcotics." Does that mean you personally or the Detroit Police Department?

A. Myself and my partner, when I said we.

Q. About how many arrests have you made?

A. I've made, approximately, five, six CCW arrests, about 10 narcotics arrests there.

Q. You saw this individual allegedly going out of 60 Claremont. Describe what he was wearing?

A. It was a vest similar to that one -- I

believe it was brown -- blue jeans and I don't remember what color shirt.

Q. What time of the evening was this?

A. Around nine o'clock, I believe.

Q. Was it dark out at this point?

(7)

A. It was still light. It would be dusk out.

Q. First of all, where were you parked at the time?

A. We weren't parked. We were driving. We were coming from Woodward toward what would have been Webb, on Woodward toward Claremont.

Q. You're familiar with the area. Is this the building that's right next to the King Cole Supermarket?

A. Correct.

Q. You saw this individual come out of the building. What did he do?

A. He looked in our direction and

immediately started stuffing the bag in his pants.

Q. You said you were in plainclothes. Was this a marked scout car?

A. Unmarked standard police detective car.

Q. There would be no indicia that it was a police car?

A. Correct.

Q. He looked in your direction; what did he do?

A. He started stuffing the bag between himself and his pants.

Q. Then, what did you do?

A. We started slowing down to take a better look at what he was doing. As we were coming to a stop, he immediately started to run.

Q. You proceeded after him on foot or in the car?

A. My partner backed up, and I got out of the car and chased (8) him on foot.

Q. How far did you chase him?

A. Approximately, three store fronts.

Q. Then, he entered a building?

A. Correct.

Q. What's the address of the building he entered?

A. I believe it's 9037 Woodward.

Q. What type of building is this?

A. It appeared to me to be a stairway going up to an apartment type building.

Q. Is this an outside stairway or inside stairway?

A. It would be inside of the building. You had one door which was opened. Then, you had a second doorway.

Q. How far did he get into this building?

A. It would be the second doorway. It would be five to ten feet from the front door.

Q. You were pursuing him the whole time?

A. Correct.

PRELIMINARY EXAMINATION TRANSCRIPT

Q. Were these glass doors or wooden doors?

A. They were glass doors.

Q. At some point, this individual ran back out of this building? What did you do at that point?

A. I grabbed him.

Q. And you subdued him?

A. I grabbed him and threw him to my other partner, who subdued (9) him.

Q. What's the name of your other partner?

A. Hayes.

Q. While your partner was subduing him, what were you doing?

A. I went around and retrieved the bag.

Q. Where was the bag?

A. Right by the second door.

Q. In front of the second door or beside the second door?

A. The door was, like, open. It was right in front of it in the corner of it.

PRELIMINARY EXAMINATION TRANSCRIPT

Q. At any time did you pull your service revolver?

A. I didn't, no.

Q. Did any other officer?

A. Officer Hayes did.

Q. Did he shoot him?

A. He ran into the defendant. They collided, and it went off.

Q. Did it strike the defendant?

A. No, it didn't.

MR. BETZ: I have no further questions, your Honor.

THE COURT: Mr. Lehto?

THE COURT: You may be excused. Thank you, Officer.

(Witness excused.)

(10) MR. LEHTO: The People move to bind over as charged.

THE COURT: Argument?

MR. BETZ: I would object to the bind over. There was no probable cause for the initial focus

by the police officers. First of all, he's not a competent witness to establish that 60 Claremont is a dope pad, but even assuming innuendo, it's a large building. There's a number of units. He's coming out of the building with a paper sack. He puts the paper sack, allegedly, under his vest. He has no reason to be in fear or feel that he's being pursued at this point, because it's an unmarked police car. These are non-uniformed officers, so he has no idea.

I think it smells of some post hoc creation of probable cause here. Clearly, under Brinnager versus United States, you need articulable basis for the initial focus. A paper bag in unlike a heroin coin envelope or something that is visibly dangerous. This is an innocuous paper bag. In Henry versus United States,

which involved boxes in a very, very similar situation where a person went into an alley to pick up boxes which had contraband in them, the Supreme Court said the subsequent pursuit was illegal. A box, in and of itself, is insufficient to give rise to probable cause for an (11) arrest. What we have here is a paper bag. We're right near King Cole's Grocery Market. Any number of people would have paper bags. Any number of people in that apartment building that he was exiting would have paper bags from going grocery shopping, any number of reasons an individual would have this. There's any number of reasons the person would place the paper bag under his vest. There's no res gestae here. It's irrational to assume that the individual knew he was being pursued when it's an unmarked car. They're

not uniformed police officers.

Also, under People versus Tally, I question the credibility here. I think it's a clear case of post hoc probable cause, rationalizing their subsequent actions after pursuing this person on a chimeral suspicion.

MR. LEHTO: Well, your Honor, not everybody who has a paper bag tried to stuff it in their pants and tries to run away from people when they look at them. The officer did have a reasonable suspicion to at least stop the defendant at this point, and he continued to flee. Before he was even stopped, he discarded the bag. There's no search and seizure. It's just a situation that would justify a stop by a police officer and a pat down, which they didn't even get to that point. I

don't (12) believe there's a search and seizure issue here, your Honor.

MR. BETZ: May I respond? The question isn't search and seizure. The question is probable cause for an arrest. There's no evidence here that the officer ever yelled, "Stop, we want to investigate," or anything. He just took off chasing him based on the fact that the paper bag was placed in a vest. That's not probable cause under United States versus Henry or Brinnager for an arrest.

MR. LEHTO: You don't need probable cause to stop someone.

MR. BETZ: That's not the standard the U.S. Supreme Court has set.

THE COURT: The Court does find there's a question of fact and does bind the defendant over as

charged, carrying a concealed weapon on person. The arraignment will be August 5th, 1982. Bond will be continued.

MR. BETZ: Thank you, your Honor.

(Hearing concluded)

(13)

STATE OF MICHIGAN)
COUNTY OF WAYNE)SS

I, Donna K. Sherman, Official Court Reporter, of the 36th District Court do hereby certify that the foregoing pages, 1 through 12, comprise a true, full and correct transcript of the preliminary examination taken in the matter of PEOPLE VERSUS ASKIA KHALIL SHABAZZ, Case No. 82-63440 (District), 82-04424, (Recorder's), on Thursday, July 22, 1982, before the Honorable Louis F. Simmons, Jr.

/s/
Donna K. Sherman, CSR-2691
Official Court Reporter

August 19, 1982

EVIDENTIARY HEARING TRANSCRIPT

STATE OF MICHIGAN
IN THE RECORDER'S COURT
OF THE CITY OF DETROIT

PEOPLE OF THE STATE OF MICHIGAN

VS

ASKIA KHALIL SHABAZZ,

Defendant

RECORDER'S COURT FILE NO. 82-04424

Proceedings had and testimony taken before the HONORABLE MICHAEL F. SAPALA, one of the Judges of the Recorder's Court of the City of Detroit on Friday, October 8, 1982, at about 11:35 a.m.

APPEARANCES:

MR. CHARLES KELLETT,
Assistant Prosecuting Attorney
On behalf of the People

MR. GERALD M. LORENCE, Attorney at Law
On behalf of the Defendant.

Carol A. Shell, CSR, RPR
Official Court Reporter
R-2387

EVIDENTIARY HEARING TRANSCRIPT

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(2)
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EVIDENTIARY HEARING TRANSCRIPT

(3) Detroit, Michigan
Friday, October 8, 1982
11:35 a.m.

PROCEEDINGS

THE CLERK: File Number 82-04424, PEOPLE VS. ASKIA SHABAZ, charged with Carrying a concealed Weapon.

THE COURT: Gentlemen, appearances for the record?

MR. LORENCE: For the record, your Honor, Gerald M. Lorence representing Mr. Askia K. Shabaz.

MR. KELLETT: Charles Kellett, on behalf of the State of Michigan, your Honor.

THE COURT: Gentlemen, we are here today for an Evidentiary Hearing to determine the legality of the seizure and/or search of an item of evidence. I suppose we have the

officer here to testify?

MR. KELLETT: Yes, Officer Surma's here. I understand that was the witness that Mr. Lorence wanted for this hearing.

THE COURT: Officer Surma, come up and be sworn.

MR. LORENCE: If I may interject, while Officer Surma is taking the stand, I brought a motion on (4) behalf of my client to quash the Information or, in the alternative, to conduct an evidentiary hearing to suppress the evidence. Now, the Court is well aware that there was a preliminary examination that was held in this matter. And, on the basis of that preliminary examination, I filed this motion with the brief, basing my allegations, and asking the Court to consider the motion to quash the Information based

on the testimony already. When I appeared for the first time that I filed this motion for the date that it was originally set, I believe it was September the 17th, the prosecutor, who was not Mr. Kellett at that particular time -- I think it was Mr. Michael Cusick -- requested an adjournment for the purposes of calling this police officer.

Now, I have no further questions of this police officer but would rely on the record. And the only reason that I am here is because the prosecutor has requested that he be present, that is, Police Officer Surma.

MR. KELLETT: Well, if I may respond, your Honor, it's my understanding counsel's allegation is something involving the credibility of the testimony that was presented at a

preliminary examination before Judge Simmons of the 36th District Court, and, as I understand the law, it has changed recently. I'm sure the Court's aware that (5) prior times the Court could read testimony and determine whether it believed the testimony that it saw in front of it in print and since then, I should say recently, within the last two years, there's -- the Supreme Court has indicated very definitely a strong disapproval of that practice because the Court is asked to substitute its evaluation of credibility without benefit of having seen the witness appear before him. And I think that's the reason why Mr. Cusick asked to have Officer Surma produced, in order to have the Court observe his demeanor and listen to his answers in regard to the alleged improper search that led

to the seizure, I believe, of the evidence that Mr. Lorence wants to have suppressed.

THE COURT: I believe Mr. Kellett is correct. Additionally, the motion is entitled Motion to Quash the Information or, in the alternative, to conduct an evidentiary hearing to suppress the evidence, which leads me to believe, obviously, Mr. Lorence was well aware of the law at the time, in terms of People v. Talley.

I think the hearing is required, so let's examine the witness.

(6)

K E N N E T H S U R M A,

called as a witness herein, after having been first duly sworn to testify the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EVIDENTIARY HEARING TRANSCRIPT

DIRECT EXAMINATION

BY MR. LORENCE:

Q. Would you please state your name for the record, sir?

A. Kenneth Surma.

Q. On the evening of July the 22nd, 1982, were you employed as a police officer in the City of Detroit?

A. I was.

Q. And were you in the vicinity of Woodward and Clairmont in the City of Detroit?

A. Yes, sir.

Q. Did you -- at that particular time were you in an unmarked scout car?

A. Yes, sir.

Q. And were you in plainclothes?

A. Yes.

Q. And you had a partner?

A. Yes.

Q. You were patrolling the area?

A. Yes, sir.

(7)

Q. And the area of Clairmont on Clairmont and -- near Woodward Avenue, did you observe Mr. Shabaz who is in this courtroom this morning?

A. Yes, I did.

Q. Had you had any reports of a felony having been committed with the description of Mr. Shabaz at the time that you observed him?

A. No, sir.

Q. Had you ever seen Mr. Shabaz before?

A. Not that I can recall.

Q. Now, you saw him exit the apartment, were you in your vehicle?

A. Yes.

Q. And how far away from him were you in your unmarked vehicle?

A. I would say approximately 50 feet or so.

Q. And was the car moving?

A. Yes.

Q. Was there traffic along Clairmont there?

A. Yes.

Q. Okay. And when he exited this apartment, you saw him come (8) out of the door?

A. Yes.

Q. And when he came out of the door of the apartment there's -- right there is the sidewalk that runs along Clairmont?

A. Yes.

Q. Now, at the preliminary examination you indicated he looked in your direction.

A. Correct.

Q. Now, when you say "direction," you're talking about the direction of your vehicle as you were proceeding along Clairmont Street?

A. Correct. We'd have been coming towards him.

Q. And you testified, also, that when he looked in your direction, he stuffed a paper bag under his vest.

A. Correct.

Q. Was he wearing any outer coat?

A. I don't believe so.

Q. But you did see a vest that he had on?

A. Correct.

Q. You don't recall him having any coat over a vest?

A. No, I don't.

Q. He had a vest. Did he have a shirt underneath that vest?

A. I believe so.

(9)

Q. And he was wearing a pair of trousers, obviously?

A. Correct.

Q. And you indicated that he had a paper bag.

A. Yes.

Q. Was this the kind of paper bag that

you would find people taking groceries out of supermarkets from?

A. yes, but it wasn't that large. It would be more of a lunch bag type size.

Q. But it was a brown paper bag.

A. Right.

Q. You indicated that on direct exam that he stuffed -- that he started stuffing the bag between -- strike that.

On direct examination, you testified that he looked in your direction and stuffed a paper bag under his vest?

A. Correct.

Q. Was he walking when he did this?

A. At that time, yes.

Q. And was he walking toward Woodward Avenue?

A. Yes.

Q. And your car was proceeding toward Woodward Avenue?

A. No. We were -- he would have been going eastbound on Clairmont. We were coming westbound.

Q. Oh, all right. So you had just either turned from or crossed Woodward Avenue, right?

A. Correct.

Q. And when he came out of 60 Clairmont, he turned toward Woodward Avenue and he was going toward Woodward while you were coming from Woodward?

A. Correct.

Q. Now, as he went toward Woodward, did you pass him and he pass you?

A. Yes.

Q. And was there a time after you had passed him that you either stopped your vehicle or got out of your vehicle?

A. Officer Scotsky, who was driving the car, started to slow down as we came up to him, you know, because he was

coming this way. We were going this way, he was slowing down, and just about to stopping. The Defendant took off running. Officer Scotsky put the car in reverse, went up to the corner in reverse, and I got out of the car and chased him.

Q. Now, when the Defendant started running, you didn't have any information that he had committed or was about to commit a felony had you?

A. No, I did not.

Q. You didn't see any weapons or any contraband in his hand at (11) that time, did you?

A. No.

Q. When Officer Scotsky stopped the car, was Mr. Shabaz past your car?

A. Yes, we would have been past each other by this time.

Q. Officer Scotsky didn't turn the vehicle around but just stopped it?

A. Correct.

Q. Who got out first, you or he?

A. I got out.

Q. And how far away was Mr. Shabaz running when you got out of the vehicle?

A. He would have been 10, 15 feet away from me.

Q. And he was running toward Woodward Avenue, right?

A. Correct.

Q. And you started running after him, right?

A. Correct.

Q. You didn't say, "Halt, please," did you?

A. No, I did not.

Q. Now, when Mr. Shabaz ran toward Woodward Avenue and got to Woodward Avenue, which direction did he turn?

A. He would have turned right, which would have been southbound.

Q. South? And right up at that corner there is a drugstore on (12) the corner?

A. Right on the corner, correct.

Q. So, he turned right at the drugstore and started running along Woodward Avenue southbound?

A. Correct.

Q. On the sidewalk?

A. Correct.

Q. There are stores and entranceways along Woodward Avenue there, past the drugstore; isn't that correct?

A. Correct. I believe there's a drugstore and a -- I believe it's a record shop and, I'm not sure if it's the doorway where he went in or another store front or not. It would be two or three different store fronts.

Q. All right. As you pursued Mr. Shabaz, you saw him go into one of the

doorways, right?

A. Correct.

Q. And that was the doorway not into a store but into, like, a vestibule that led to a stairway that went to the upstairs part of the store?

A. Correct.

Q. Now, when he did turn into one of the doorways, how far behind him were you?

A. When he turned in the doorway, I was maybe five, ten feet (13) away at this time, right in there.

Q. And you pursued him inside the doorway?

A. Correct. As he was coming out of the doorway, I was going in and this is where I had grabbed him and we had -- Officer Hayes was working with us -- there was three of us working, and I grabbed him. He tried to push away and I tossed him towards Officer Hayes, who grabbed him and I went into

the vestibule doorway and retrieved the bag.

Q. Now, when you grabbed him, you didn't have any additional information or sighting that he had committed a felony or was about to commit a felony, had you?

A. No, I did not.

Q. Now, read before a statement that you made on direct examination about first observing Mr. Shabaz and seeing him stuffing a paper bag under his vest. I want to show you just a question and answer, just read it to yourself, refresh your recollection, and this is on page 7 after your answer about stuffing it under his vest and ask if that refreshes your recollection.

A. Okay.

Q. Now, do you recall having been asked that question, also, you saw an individual come out of a building;

what did he do, do you recall that?

(14)

A. Saw stuff, right.

Q. And then your answer was he looked in our direction and immediately started stuffing the bag in his pants.

A. If I may clarify what I understand, the vest and then into the pants because I would assume I can't see completely under his vest when he started running. He wouldn't -- he wasn't holding it and if it was just under his vest it would have came out. So I -- what I would mean -- he put it under his vest and I would assume I should say he put it in the pants. If it was just in the vest it would fall out while he would have been running. I would assume so. This is what I am thinking now -- no, in my mind -- if you can understand that.

Q. Well, what you're going to say is

adding something additional to this.

A. No, I am trying to clarify in my mind, you says if the difference between under -- the vest is covering the pants. I can't say for sure it's in the pants or under the vest. I would assume it would be -- it would go under the vest and into the pants as he's running or else it would fall out if it's just under the vest.

Q. When Mr. Shabaz is running, did you see anything in his hand?

A. No.

Q. You said that Officer Hayes was the third officer that was (15) with you that particular night; is that correct?

A. Correct.

Q. And he was also in plainclothes?

A. That is correct.

Q. All of you were; isn't that correct?

A. Yes.

Q. It was you who physically stopped Mr. Shabaz?

A. At very first, yes.

Q. And while you were subduing him, was it one of the other officers who went in and retrieved the bag?

A. No, I went in and retrieved the bag.

Q. Now, all the time that you were pursuing Mr. Shabaz, even at the point where he went into that vestibule, you hadn't yelled or identified yourself as a police officer, did you?

A. Not at that time, no, sir.

Q. And you didn't at any time say, "Stop, in the name of the law," or, "Stop, I'm a police officer?"

A. No, sir.

Q. Now, when you went inside and retrieved the bags, were there two doors to go through?

A. If I can -- there's a front door then it's like a vestibule. I would say

maybe five, eight feet long, and there was another door that's there but it was open, you know; it wasn't closed.

(16)

Q. And you found a bag?

A. Yes.

Q. And where did you find the bag?

A. By the door that was open.

Q. It was a brown paper bag?

A. Yes.

Q. It was closed, wasn't it? It wasn't open?

A. The bag?

Q. Yes.

A. Yes.

Q. Yes, it was closed?

A. Right, right.

Q. 60 Clairmont, had you ever been in that building?

A. Yes, I have.

Q. How many, not tenants but apartments?

A. Roughly, at least 30.

Q. Thirty apartments.

A. I would say roughly, yeah, because there's at least three floors that I know of, so, approximately 10 rooms to a floor.

Q. So you say when you first observed Mr. Shabaz you saw him coming out of the apartment?

A. Correct.

Q. Does that apartment have an outer door and an inner door, also?

(17)

A. Yeah, there's a vestibule, I believe, and another door.

Q. Now, you didn't see him come through the inner door, did you?

A. No.

Q. So you didn't know whether he was in that apartment at all, did you?

A. No, I do not.

Q. And if he were in that apartment, you didn't know which apartment he was in?

A. No.

MR. LORENCE: I have nothing further.

THE COURT: Mr. Kellett, cross-examine.

MR. KELLETT: Just a couple questions.

CROSS-EXAMINATION

BY MR. KELLETT:

Q. Officer Surma, when you first saw Mr. Shabaz come out of the building that you describe, you said you saw him look in your direction.

A. Correct.

Q. And that as soon as he looked in your direction, he put a bag somewhere.

A. Correct.

Q. On his person, under his vest?

A. Underneath his vest area.

(18)

Q. All right. How long have you been a police officer?

A. Eleven years.

Q. What was in your mind, what do you believe was in your mind, Mr. Shabaz was doing at the time you saw him put that bag on his person when he, after he looked in your direction?

A. I believe he was hiding something.

Q. What; anything in particular?

A. I believed it to be either weapon or narcotics.

Q. Is that why you -- your partner -- stopped the vehicle that you were a passenger in?

A. Correct.

Q. And you said as soon as you came to a stop Mr. Shabaz then began to run.

A. Yes.

Q. You're assigned to 13th Precinct; is that correct?

A. Correct.

Q. And this intersection is at Woodward and Clairmont?

A. Yes.

Q. Is that a corner that, perhaps, one might expect to find a lot of narcotics or concealed weapons at?

A. Yes, we have -- there's problems of -- there's a lot of whores at that corner. Prostitutes, I should say.

THE COURT: Oh, I am sorry. I thought you (19) said horrors.

THE WITNESS: There're probably both which -- we've had a lot of complaints johns getting ripped off, narcotics and the building of 60 Clairmont we've had problems with.

Q. (Mr. Kellett, continuing) That's not in fact known as the Mount Royal Hotel?

A. No. It's just a memory.

MR. KELLETT: Nothing further.

THE COURT: Redirect.

REDIRECT EXAMINATION

BY MR. LORENCE:

Q. Mr. Kellett has asked you what is in your mind when you saw Mr. Shabaz and this bag. You didn't know for sure what was in this bag when you saw it; it wasn't opened, was it?

A. Not for sure, no.

Q. And you have never seen Mr. Shabaz before, have you?

A. No, I have not.

Q. Right across, or very close to this apartment, there's a supermarket; isn't there?

A. Yes.

Q. People normally bring things out of the supermarket in that same type of bag, too; don't they?

(20)

A. Yes.

Q. If somebody came out of that supermarket with even a smaller bag than the one that Mr. Shabaz had and put it underneath his coat or in his pants, would you stop him?

A. It all depends. It could have been supermarket holdup he -- if he started running, I would probably think.

Q. If Mr. Shabaz started running after your car past him?

A. As we started to stop.

Q. But you don't (know) the reason for him running, do you?

A. No. I got suspicious.

MR. LORENCE: That's all.

THE COURT: Mr. Lorence, we've heard enough. Haven't you?

MR. LORENCE: Yes, thank you.

THE COURT: Anything further?

MR. KELLETT: No, your Honor.

THE COURT: Thank you, Officer, very much. You may stand down.

Argument, Mr. Lorence?

MR. LORENCE: Your Honor, I am sure the Court has read my brief and memorandum. I stand on that.

THE COURT: Response?

MR. KELLETT: My response would be, your (21) Honor, that it is probable cause for a -- stopping someone is based on the circumstances as well as what the officer reasonably believes, and he has indicated what he believed. The courts of this state have indicated -- the trial courts may take notice of the fact of the, not only the circumstances but certainly

the area in which they occurred. Clairmont and Woodward, as the Court's very well aware, is a rather high crime area and Mr. Shabaz was not coming out of a supermarket with a bag, bag of groceries, and I think an officer with eleven years on the street knows pretty much whether -- and as he indicated he thought either narcotics or a gun, from his experience and from the Court's, I think, knowledge of Clairmont and Woodward would be a very reasonably assumption. And, in fact, it did turn out to be a gun and I don't think his actions were unreasonable. And I would ask the Court to deny the motion.

THE COURT: Rebuttal?

MR. LORENCE: Do I have to?

THE COURT: No.

MR. LORENCE: Thank you.

THE COURT: I want to thank Officer Surma for his testimony in this cause. I find him to be a totally credible witness. He has been in this court before and there (22) is no reason to question his veracity.

The problem with this case is, I believe is, that People vs. Terrell, 77 Mich Ap 676, I believe applies, and I believe Terrell to still be the law and it is extra-ordinary how this case comports with Terrell on its facts. In Terrell, although the intersection was different -- that was Fenkell and Dexter -- at that time also has a little bit of crime. Police Officer Michael Dwyer, 4 o'clock in the afternoon, was driving an unmarked scout car and he saw the Defendant

standing at the corner. As Officer Dwyer drove through the intersection, the Defendant reached into his pocket, ran on Dexter. Officer Dwyer testified at the hearing he believed it possibly to be a gun in his pocket, that's why he took the chase. The defendant ran into the apartment building and up the second floor, where the officer observed him pull his hand out of his pocket and drop a coin envelope containing a brown substance. The arrest was made, substance containing contraband.

The only difference between that case and this case is that there was a bag seen in this case versus the hand in the pocket in Terrell. I find that, under the circumstances here, to be a distinction without a difference. it's unfortunate in the sense we have

experienced police (23) officers who have to suffer with these rulings. But nevertheless, that they have to. The trial court suppressed the gun or narcotics in Terrell and dismissed the case. The case was appealed by the Wayne County Prosecutor's Office. The Court of Appeals held that trial court's determination to suppress was, quote, "soundly based on existing law, state and federal", close quote. They went on to cite Terry and additionally they stated at 679, quote, "A totality of facts and circumstances which could provide the officer with a reasonably belief that criminal activity may be afoot was simply lacking in the instant case. Defendant's furtive gestures may have aroused the police officers' general suspicion, but without some additional, specific knowledge on the part of the officer,

they were insufficient to justify an intrusion," close quote, citing Siveran vs. New York and a number of other cases, quote, "...nor is the officers' conduct justified under the hot pursuit exception to warrant clause," citing Worden vs. Hayden. The Court went on to say, quote, "It was not justified at its inception and was therefore unlawful, in violation of Defendant's 4th Amendment rights. The initial invasion being improper, the seizure of the coin envelope was unpermissible under the plain-view exception articulated in Coolidge, the seizure of evidence (24) cannot be justified," close quote.

So for those reasons stated, the motion to suppress is granted. The case is dismissed. I would note for the record that it is the Court's personal belief that this

is an unfortunate result, the Defendant having four prior concealed weapons convictions, a habitual information having been filed against him. But the Court is compelled to follow the law as it sees it, so be it.

That's all. Goodbye.

- - -

(25)

STATE OF MICHIGAN) SS
COUNTY OF WAYNE)

CERTIFICATE OF COURT REPORTER

This is to certify that I, Carol A. Shell, did stenographically report the foregoing testimony and proceedings had in the above-entitled cause, as hereinbefore set forth, and that the annexed and foregoing typewritten transcript does constitute a true, full, and accurate report of such proceedings, and of my stenographic notes so taken.

/s/
Carol A. Shell,
Official Reporter

Supreme Court, U.S.
FILED
MAY 12 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1265

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1985

THE PEOPLE OF THE STATE OF MICHIGAN
Petitioner

vs.

ASKIA KHALIL SHABAZ
Respondent

ON WRIT OF CERTIORARI
TO THE MICHIGAN SUPREME COURT

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

I.

IS THE FOURTH AMENDMENT IMPLICATED WHEN THE POLICE SIMPLY UNDERTAKE TO RUN AFTER AN INDIVIDUAL, WHO HAS RUN AT THE SIGHT OF THEM, WITHOUT ANY ACTUAL RESTRAINT ON THE FREEDOM OF MOVEMENT OF THAT INDIVIDUAL BY PHYSICAL FORCE OR SHOW OF AUTHORITY, SO THAT A WEAPON THROWN TO THE GROUND BY THE INDIVIDUAL DURING HIS FLIGHT CANNOT BE CONSIDERED ABANDONED?

II.

ASSUMING ARGUENDO THAT THE PURSUIT OF AN INDIVIDUAL BY AN UNDERCOVER OFFICER, WITHOUT MORE, CONSTITUTES A SEIZURE, INDEPENDENT OF AN ACTUAL PHYSICAL RESTRAINT, DID THE FLIGHT OF THE RESPONDENT AFTER LEAVING A BUILDING AT WHICH NARCOTIC AND WEAPONS OFFENSE ARRESTS HAD PREVIOUSLY BEEN MADE, AND AFTER ATTEMPTING TO HIDE A PAPER BAG IN HIS VEST OR PANTS UPON THE OBSERVATION OF AN UNMARKED POLICE CAR, CONSTITUTE REASONABLE SUSPICION FOR AN INVESTIGATIVE DETENTION?

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The opinion of the Michigan Court of Appeals is unreported and is appended as Appendix A to the Petition for a Writ of Certiorari. The Opinion of the Michigan Supreme Court is reported at 424 Mich 42 (1985).

STATEMENT OF JURISDICTION

The judgment of the Michigan Court of Appeals was entered on August 12, 1983. The judgment of the Michigan Supreme Court was entered on December 4, 1985. The jurisdiction of this Court is invoked under 28 USC Sec 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath

> or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> ...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The respondent was charged with Carrying a Concealed Weapon, contrary to MCL 750.227; MSA 28.424. A preliminary examination was held in the 36th District Court of the City of Detroit, before the Honorable Louis F. Simmons, Jr., on July 22, 1982, and the respondent was bound over for trial.

A motion to quash the information or in the alternative to conduct an evidentiary hearing to suppress the evidence was filed and a hearing pursuant thereto was conducted on October 8, 1982, before the Honorable Michael F. Sapala, Judge of the Recorder's Court.

Testimony was adduced at the evidentiary hearing from Police Officer Kenneth Surma. The officer testified to having been on an auto patrol with his partners in the area of Woodward and Clairmont in the City of Detroit, on July 22, 1982 at approximately 9:15 p.m. The

officers were in plain clothes and in an unmarked patrol car (J.A. 6,28). The vehicle was described as an "unmarked standard police detective car" (J.A. 12). The officer identified the respondent as a man seen leaving an address of 60 Clairmont, an apartment building. The officer testified that at the intersection of Woodward and Clairmont, there had been a lot of narcotics and concealed weapons arrests, as well as prostitution related crimes. "John's getting ripped off." (J.A. 9,10,46).

The officer specified 60 Clairmont as an address wherein these problems had taken place (J.A. 9,46). The officer and his partner had made five or six Carrying a Concealed Weapons arrests and ten narcotics arrests at the address (J.A. 10). The officer had been working in this area for approximately eleven years (J.A. 8,45).

The respondent exited 60 Clairmont and

began to walk eastbound on Clairmont. The patrol car was proceeding westbound on Clairmont (J.A. 6-7). At the point that the officers first observed the respondent they were approximately 50 feet or so from him (J.A. 29).

As the respondent was walking towards Woodward, he looked in the direction of the patrol car and began stuffing a paper bag under his vest (J.A. 7,12). The bag was described as a small size lunch bag (J.A. 32). The respondent was not wearing an outer coat (J.A. 31). The respondent walked to a point where he and the car would pass, and as the car began to slow down, the respondent began running (J.A. 33-34). The car had slowed down to take a better look at what the respondent was doing (J.A. 12). The officer got out of the passenger side of the automobile as it stopped and followed the respondent onto Woodward Avenue (J.A. 13). The officer acknowledged at this

point no felony reports against the respondent had been received, nor did he observe any weapons or contraband (J.A. 34,39).

The respondent was running approximately 10 to 15 feet ahead of the police officer (J.A. 35). The respondent ran to Woodward Avenue, turned right, which would have been in a southbound direction, and continued to run past two or three different store fronts (J.A. 36). The officer did not call out "halt", or any other such command (J.A. 35,41).

The respondent ran into one of several doorways along a storefront which led into a vestibule and stairway (J.A. 37). At this point the officer was approximately 5 to 10 feet away from the respondent and the respondent turned and tried to come back through the doorway past the officer (J.A. 37). The officer grabbed the respondent and pushed him

towards his partner who had just gotten there (J.A. 14,37). The officer did not draw his service revolver; although, at the time the respondent ran back through the vestibule, his partner had arrived with his service revolver pulled (J.A. 15). The respondent collided with him and the gun discharged, but no one was struck.

The officer then went into the vestibule doorway and retrieved the bag which was thrown by an open interior door within the vestibule (J.A. 14). The bag was a brown paper bag which was closed (J.A. 42). The officer confiscated the .357 Magnum from the bag, and unloaded it (J.A. 8). The officer acknowledged that when he grabbed the respondent he did not have any additional information or sighting that the respondent had committed a felony or was about to commit a felony (J.A. 34). The officer acknowledged that while the respondent

was running he did not see anything in his hands (J.A. 34).

The officer testified that all the time he was pursuing the respondent up to the point that he followed him into the vestibule, the officer did not yell out nor identify himself as a police officer. He did not at any time yell, "stop in the name of the law" or "stop, I'm a police officer." (J.A. 41). The officer testified that he had been in the building at 60 Clairmont many times and that it contained approximately thirty apartments (J.A. 42).

The officer testified that he had been a police officer for approximately eleven years. It was his belief that at the time that he saw the respondent putting the bag under his vest that he was hiding something, either a weapon or narcotics (J.A. 45). The officer testified that he had not seen the respondent before (J.A. 47). The officer acknowledged that

across the street or very near to the apartment house was a supermarket (J.A. 47). The officer clarified that the respondent started running just as the car passed him and it was about to stop (J.A. 48).

At the preliminary examination, the petitioner argued that the police had a reasonable suspicion to stop the respondent; however, before he was stopped the respondent discarded the bag; thus, there was no search or seizure (J.A. 18).

The petitioner argued that based on the circumstances as well as the high crime area, the officer's conduct was reasonable. In ruling, the trial court credited the officer as a totally credible person for whom he had no reason to question his veracity (J.A. 51). The court also noted the case of People v Terrell, 77 Mich App 676 (1977) and believed that Terrell was the existing

law and that he was governed thereby (J.A. 51). The court granted the motion to suppress and dismiss the case with a personal note that it was the court's personal belief that it was an unfortunate result (J.A. 54-55).

The Michigan Court of Appeals and the Michigan Supreme Court affirmed the dismissal.

SUMMARY OF ARGUMENT

The Michigan Supreme Court upheld a trial court dismissal of a possession of a concealed weapons charge, finding that the totality of circumstances did not provide the particularized suspicion that criminal activity was afoot so as to justify the temporary detention of the respondent, thus violating the respondent's privacy rights under the Fourth Amendment. The dissenting justices found as a matter of law that the act of running after another did not constitute a detention for investigation; thus the conduct did not constitute a seizure under the Fourth Amendment. Assuming the conduct did constitute a seizure, the dissenting justices further found that there existed reasonable suspicion to justify the seizure of the respondent and the plain view seizure of the evidence.

Petitioner contends that a "seizure" of the person occurs under the Fourth Amendment when 1) an individual, who is innocent of any crime, would believe, due to an exercise of official authority or a show of force, that he is not free to go on his way with impunity and acquiesces to the exercise of official authority or show of force, or 2) an individual is actually physically restrained by the exercise of physical force.

The facts in this case demonstrate that there was no exercise of official authority or physical force by the police officers who simply ran after an individual who ran at the sight of them. The officers were in plain clothes, in an unmarked standard police vehicle. No questions or commands were issued by the officers, nor did they have the opportunity to provide the respondent with any identification. The police, by their conduct, did not cause any

restraint of the respondent's freedom of movement.

Petitioner also submits that the Michigan Supreme Court erred in finding that the act of abandonment was in direct response to an anticipated unjustified seizure. Petitioner contends that the respondent, through his conduct of discarding the evidence to the ground, relinquished any expectation of privacy. An individual may only assert a Fourth Amendment right if seized and searched.

Assuming that the conduct of the officers constitutes a seizure such that some level of cause is necessary to justify the pursuit, petitioner submits that there exists sufficient articulable facts to constitute reasonable suspicion and justify the temporary detention.

ARGUMENT ONE

THE FOURTH AMENDMENT IS NOT IMPLICATED WHEN THE POLICE SIMPLY UNDERTAKE TO RUN AFTER AN INDIVIDUAL, WHO HAS RUN AT THE SIGHT OF THEM, WITHOUT ANY ACTUAL RESTRAINT ON THE FREEDOM OF MOVEMENT OF THAT INDIVIDUAL BY PHYSICAL FORCE OR SHOW OF AUTHORITY, SO THAT A WEAPON THROWN TO THE GROUND BY THE INDIVIDUAL DURING HIS FLIGHT MUST BE CONSIDERED ABANDONED.

A. Introduction: The Analytical Framework

In undertaking an analysis of constitutional questions, it is always wise to keep the text of the constitutional provision involved firmly in mind, to the end that one avoids engaging only in an interpretation of a previous analysis, which itself expressed a particular point of view, rather than an analysis of the constitution, with a result that may have little relation to the actual language of the constitution itself. Involved in this case is a seizure question. The Fourth Amendment provides in relevant

part that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated. ...

The Fourth Amendment's requirement that a search and/or seizure be reasonable, that it be grounded on some objective justification, governs all seizures of the person, "including seizures that involve only a brief detention short of traditional arrest". Davis v Mississippi, 394 US 721 (1969); Terry v Ohio, 392 US 1,16-19 (1968); United States v Brignoni-Ponce, 422 US 873 (1975); United States v Mendenhall, 446 US 544, 552 (1980) (it should be observed that nowhere in the Fourth Amendment does one find the term "arrest"; the Fourth Amendment governs "seizures", including those of the person). This Court has made plain that encounters between citizens and police officers vary in kind and degree, and has

cautiously differentiated the attendant Fourth Amendment implications.

> The Fourth Amendment does not proscribe all contact between the police and citizens, but is designed "to prevent arbitrary and oppressive interference by law enforcement officials with the privacy and personal security of individuals". United States v Martinez-Fuerte, 428 U.S. 543,554 (1976)...As we have noted elsewhere, "Obviously, not all personal intercourse between policemen and citizens involves a 'seizure' of the person. Only when the officer by means of physical force or show of authority, has restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." Terry v Ohio, 392 U.S. 1,19, n. 16...
>
> Immigration and Naturalization Service v Delgado, __US__; 104 S Ct 1758 (1984).

A majority of this Court has adopted the "formula" proffered by Justice Stewart in Mendenhall and refined by Justice White in Royer as a standard by which police-citizen encounters may be assessed. Florida v Royer, 460 US at 498-501 (1983); I.N.S v Delgado, 104 S Ct at 1769.

While each case of course turns on its own facts, guidance for the bench and bar is necessary. This Court has recognized the need to establish demarcations of categories of police-citizen encounters to aid in the analytical inquiry. Three generic classes of police-citizen contact have evolved. First, a consensual encounter wherein an officer merely approaches an individual on the street or in another public place, asks him if he is willing to answer some questions, and puts the questions to the person if he is willing to answer. The person approached need not answer any questions put to him; indeed, he may decline to listen at all and may go on his way. Terry v Ohio, 392 US at 32-33; Florida v Royer, 460 US at 497-498. The individual may not be detained, even momentarily, without reasonable, objective grounds for doing so, and his refusal to listen or answer does not, without more, provide those

grounds. But "If there is no detention- no seizure within the meaning of the Fourth Amendment- then no constitutional rights have been infringed." Florida v Royer, 460 US at 499.

The second class permits the "limited intrusion of the personal security" of a person detained based on articulable suspicion not amounting to probable cause and justified by substantial law enforcement interests (e.g. investigative stops). Michigan v Summers, 452 US 692,699 (1981).

The third class is the time honored probable cause based arrest to hold the individual for a crime charged against him. Dunaway v New York, 442 US 200,207-9 (1979).

The Michigan Supreme Court, drawing from Royer, characterized these classes as "tiers", and adopted the analysis in its application to the instant case. The Michigan Supreme Court "passed" on (that

is, ruled upon) the application of the first tier. The majority found no application of the first tier to the instant facts. "Plainly, the police encounter with the defendant in this case was not at either the first or third tier of the Royer analysis." People v Shabaz, 424 Mich 42,58 (1985). The dissenting justices found that as a matter of law a forcible stop triggering the Fourth Amendment had not occurred:

> I would conclude that on this record there was not an intrusion on protected interests sufficient to constitute a stop. While the reasonable belief of an individual actually stopped by the police is relevant to whether a seizure has occurred, the threshold issue, whether there has been a "stop", is one of law. I would find on this record that one individual running after another is, as a matter of law, not a detention for investigation. 424 Mich 71.

It is submitted that the Shabaz dissent properly interprets the term "seizure", and that the application of that view to the facts demonstrates that

there was no infringement on the citizen's privacy or personal security so as to trigger the Fourth Amendment. It will be the position of the petitioner that a "seizure" of the person has occurred under the Fourth Amendment when either 1) an individual, who is innocent of any crime, would reasonably believe, due to an exercise of official authority or a show of force, that he is not free to go on his way with impunity, and acquiesces to the exercise of official authority or show of force, or 2) an individual is actually physically restrained by the exercise of physical force. In the instant case, neither occurred before the time respondent abandoned his weapon.

B. A Seizure Is A Seizure Is A Seizure:[1] One May Only Litigate That Which Happened To Him

Prior to Terry v Ohio, any restraint of a person amounting to a seizure for purposes of the Fourth Amendment was commonly understood to be invalid unless justified by probable cause. In establishing a limited exception to the rule, the Court in Terry recognized that not all personal interactions between the police and the citizenry constitute a "seizure". Terry v Ohio, 392 US at 19, n.16. This Court has subsequently refined the distinction drawn in Terry "that a person is 'seized' only when, by means of physical force or a show of authority, his freedom is restrained." United States v Mendenhall, 446 US at 554.

> We conclude that a person has been "seized" within the meaning of the Fourth Amendment only if, in view

---

[1] Gertrude Stein from Sacred Emily, "Rose is a rose is a rose is a rose."

> of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of the circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating the compliance with the officer's request might be compelled. See Terry v Ohio, supra, 392 U.S. at 19, n.16, 88 S. Ct., at 1879, n.16; Dunaway v New York, 442 U,S. 200.297, and n.6, 99 S. Ct. 2248,2253, 60 L. Ed. 2d 824; 3 W. Lafave, Search and Seizure 53-55(1978). In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure (emphasis added).
>
> United States v Mendenhall, 446 US at 555.

A survey of the lead cases wherein a "seizure" is considered demonstrates that often the determination is "fact bound", turning heavily on assessments of credibility and the possibility of subtle influences from the circumstances, but only where the question involved is whether an individual who has refrained

from going on his way did so because of an objectively reasonable perception of an official exercise of authority or show of force. Whether the individual in fact refrained from going on his way (or was physically prevented from doing so), is not, however, ordinarily a subtle factual question, but, as indicated by Justice Boyle, readily ascertainable.

The seminal decision in recognizing a distinction, for Fourth Amendment purposes, between an encounter which constitutes an intrusion upon a constitutionally protected right and that permissible contact which does not impact upon security rights of the individual is, of course, Terry v Ohio. In Terry, a plainclothes police officer of thirty nine years experience observed what he believed to be criminal activity in the making. The officer observed the defendant in the company of two others for a period of time, then approached

him, identified himself as a police officer and asked the men for their names. "When the men 'mumbled something' in response to his inquiries, Officer McFadden grabbed the petitioner Terry, spun him around so that they were facing the other two, with Terry between McFadden and the others, and patted down the outside of his clothing." Terry v Ohio, 392 US at 7; United States v Mendenhall, 446 US at 553. The Terry Court "assume[d] that up to that point [before the officer had physically restrained Terry for the purpose of searching for weapons] no intrusion upon constitutionally protected rights had occurred." 392 US at 19 n. 16. This Court in Mendenhall, opined that this assumption was entirely correct. 446 US at 553.

Mendenhall also referred to Sibron v New York, 392 US 40 (1968), the companion case to Terry, wherein the Court did not

consider the issue of whether a "seizure" had occurred when a uniformed police officer approached the petitioner in a restaurant, told him to come outside, and he complied. The Sibron Court indicated the record "was barren of any indication whether Sibron accompanied [the Patrol man] outside in submission to a show of force or authority which left him no choice, or whether he went voluntarily in a spirit of apparent cooperation with the officer's investigation." Sibron v New York, 392 US at 63. Mendenhall notes that "Plainly, in the latter event, there was no seizure until the police officer in some way demonstrably curtailed Sibron's liberty" (emphasis added). United States v Mendenhall, 446 US at 554.

The task of distilling a working definition of "seizure", in reference to the Fourth Amendment proscription against unreasonable seizures of the person, was

undertaken by Justice Stewart, and although he failed to command a majority of Justices in the opinion, the standard he proferred is now embraced by a majority of this Court. Justices Stewart and Rehnquist concluded that a person is "seized only when, by means of physical force or a show of authority, his freedom of movement is restrained.... and if, in view of all the surrounding circumstances, a reasonable person would have believed that he was not free to leave." United States v Mendenhall, 446 US at 554-555. The facts as found by the Court did not support the finding that a "seizure" had taken place under this test, not because the individual did not in fact stay, but because that response was not viewed as compelled by any conduct of the officers.

Justice Stewart bifurcated the analysis of the facts, finding no "seizure" in the initial encounter, where

two federal drug agents approached a woman who arrived in Detroit from Los Angeles, identified themselves as federal agents, and asked to see her identification and airline ticket, upon which request she produced her driver's license and the ticket. He found a voluntary accompaniment; that is consent, in petitioner's trip to the DEA office after the agents discerned that different names were utilized, and inquired further of the defendant, specifically identifying themselves as federal narcotic agents, and the defendant became shaken and nervous. Thus, the search of defendant's person was not preceded by an impermissible seizure.

> On the facts of this case, no "seizure" of the respondent occurred. The events took place in the public concourse. The agents wore no uniforms and displayed no weapons. They did not summon the respondent to their presence, but instead approached her and identified themselves as federal agents. They requested, but did not demand to see the respondent's

> identification and ticket. Such conduct without more, did not amount to an intrusion upon any constitutionally protected interest. The respondent was not seized simply by reason of the fact that the agents approached her, asked her if she would show them her ticket and identification, and posed a few questions. Nor was it enough to establish a seizure that the person asking the questions was a law enforcement official.... In short, nothing in the record suggests that the respondent had any objective reason to believe that she was not free to end the conversation in the concourse and proceed on her way, and for that reason we conclude that the agent's initial approach to her was not a seizure.
>
> United States v Mendenhall, 446 US at 1877-1878

Justices Powell, Blackmun and Chief Justice Burger did not reach the contention that the encounter did not constitute a "seizure", finding that neither of the Courts below considered the issue; therefore, they proceeded on the assumption that a seizure had occurred and found it to be reasonable, thus concurring with the judgment. Justices White, Brennan, Marshall and

Stevens dissented, finding that the seizure issue was not raised below, and that the record developed below was inconclusive; further, that certain objective factors were improperly discounted. United States v Mendenhall, 446 US at 571.

In Florida v Royer, another case involving the reasonable perceptions of an individual in response to an encounter with government officials, this Court divided as to the application of a seizure standard to the facts; however, a fair reading of the opinion discerns a majority approach to the "seizure" standard. Justices White, Marshall, Powell, and Stevens employed the Mendenhall test to find that the facts in Royer demonstrated that "what had begun as a consensual inquiry in a public place had escalated" into a restraint under Terry. Florida v Royer, 460 US at 504, fn.9 [noting the consistency of the Royer

opinion with Mendenhall] and 508 [Justice Powell noting the factual distinction between Mendenhall and Royer, and finding in Royer a "lawful initial questioning"].

Justice Brennan, concurring in the result, found it unnecessary to reach the question of the legality of the initial stop; however, he did opine that the initial stop constituted a "seizure" due to the "show of authority and the restraint of Royer's liberty." 460 US at 512. Justice Blackmun, dissenting from the judgment that probable cause was required, specifically adopted the Mendenhall standard. Florida v Royer, 460 US at 515. Justices Rehnquist, O'Connor and Chief Justice Burger dissented from the judgment of the Court in finding that an arrest took place; however, they made reference with approval to the Mendenhall standard as it relates to the definition of a seizure. Florida v Royer, 460 US at 523.

It must be observed that in neither Royer nor Mendenhall was a restraint of liberty achieved by the application of physical force to the person of the individual--the question in each case, at least initially, involved official conduct and reasonable perceptions of that conduct by individuals who did not attempt to go on their way. In Royer, the plurality found the initial encounter, where the defendant was simply asked for identification, permissible, as involving no seizure; however, after the officers identified themselves as narcotics officers and told him of their suspicions and asked him to accompany them without having returned the tickets or identification, which he had surrendered upon request, or indicating that he was free to leave, Royer was effectively seized. 460 US at 500. The dissenting justices also found the initial encounter permissible, but found

that there existed reasonable suspicion to justify the further detention of the defendant. That detention did not constitute an arrest. 460 US at 523-526.

Justice Blackmun, in concurring with the plurality's adoption of the Mendenhall standard, began his analysis of the initial encounter by finding reasonable suspicion and characterizing the intrusion as short-lived and minimal. Florida v Royer, 460 US at 515,519. Justice Brennan found that when a police officer approaches an individual, identifies himself and asks the traveler for identification and his ticket, the individual has been "seized" for purposes of the Fourth Amendment. 460 US at 512.

In the airport stop genre of cases, this Court has recently reaffirmed the application of the Mendenhall-Royer standard of a "seizure". In a per curiam opinion, this Court held that certain constraints on personal liberty that

constitute a "seizure" for purposes of the Fourth Amendment are justifiable based on the lesser standard or articulable suspicion. Drawing from the Mendenhall standard, the Court in Florida v Rodriguez, recognized that an initial contact between officers and citizens, where the citizens were simply asked if they would listen to the officers questions, was clearly the type of consensual encounter that implicates no Fourth Amendment interest. Florida v Rodriguez, __US__; 105 S Ct 308; 83 LEd 2d 165 (1984).

In Reid v Georgia, 448 US 438 (1980) this Court reversed a lower court's determination of reasonableness and remanded the case to the state court, with Justices Rehnquist, Powell, Blackmun and Chief Justice Burger dissenting and expressing the belief that the police conduct did not implicate the Fourth Amendment. On remand, the Georgia court

found that no seizure had occurred when DEA agents approached individuals in an airport, identified themselves, asked them to cooperate in a drug investigation by permitting a pat-down search of their persons, and secured the individual's agreement to return to the terminal, at which point the defendant turned, fled and discarded a purse prior to his apprehension. The Court, relying on Mendenhall, found that the individual's freedom of movement had not been restrained by any physical force or show of authority. State v Reid, 247 Ga. 445, 276 S.E.2d 617, on remand, 158 Ga. App 570, 281 S.E.2d 650, cert. den., 454 U.S. 883, 102 S. Ct. 369, 70 L Ed2d 195 (1981).

In a different context, a factory survey setting, this Court, speaking through Justice Rehnquist, recently reaffirmed the Mendenhall-Royer standard for determining if the Fourth Amendment

is implicated by the mere questioning of a citizen by police officials. The Court addressed the element of the consensual nature of the encounter with reference to Brown v Texas, 443 US 47 (1979). The Court noted that while it is true that most people will respond to a question propounded by the police, this fact does not render the encounter any less consensual.

> Unless the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded, one cannot say the questioning resulted in a detention under the Fourth Amendment. But if the person refuses to answer and the police take additional steps - such as those taken in Brown - to obtain an answer, then the Fourth Amendment imposes some minimal level of objective justification to validate the detention or seizure (citations omitted).
>
> I.N.S. v Delgado, 104 S Ct at 1763

The Delgado Court found that the positioning of identifiable Immigration agents who wore badges, carried

walkie-talkies, and were armed, at the exits and on the premises of a private factory, and who approached employees and asked for identification, did not constitute a seizure of the work force, nor did the addressing of citizenship questions constitute a seizure of the person. The Court noted that though if any person had attempted to evade the questioning by attempting to leave the premises those persons might have been detained by the I.N.S. officials, no such claim was made as to the rights of the respondents before the Court, as the respondents answered the questions and went on their way. The Court also noted the mere fact that a person may have been questioned if he attempted to leave did not create a reasonable apprehension of detention or seizure. 104 S Ct at 1764. Justice Powell concurred in the opinion, noting that the question of whether a seizure had occurred turned on a

difficult characterization of fact and law. Justice Stevens joined the opinion of the Court, while Justices Brennan and Marshall dissented.

While noting that the majority of the Court had adopted the Mendenhall-Royer test, the dissent also opined that the rule does not look to the subjective impressions of the person questioned, but rather to the objective characteristics of the encounter which may suggest whether a reasonable person would believe he was free to walk away. I.N.S. v Delgado, 104 S Ct at 1769. The dissent found that there was a show of authority of a sufficient size and force to overbear the will of any person, and thus a seizure occurred.

From a survey of the cases from this Court one may discern a standard by which courts may adjudge whether the police-citizen encounter in question implicates the Fourth Amendment. In the majority of

cases an encounter of some sort has in fact occurred, and the courts are obliged to give legal character to the encounter. In the instant case, as noted by the dissenting Michigan justices, the factual predicate to a legal determination of the presence or absence of an appropriate level of cause - the existence of a stop or detention - is missing. The dissenting justices cogently argued that, as a matter of law, one individual running after another does not constitute a seizure under the text of the Fourth Amendment. People v Shabaz, 424 Mich at 71. Petitioner submits that in the absence of a show of authority or physical force, when police simply undertake to run after an individual who runs at the sight of police officers, no actual restraint of freedom of movement of that individual has occurred. A seizure is a detention. If there has been no detention, there has been no

seizure.

While it is true that there can be a brief encounter which is not a "seizure", it is not true that there can be a seizure without the loss of the freedom of locomotion, achieved against the will of the individual. Even if some exercise of official authority or show of force is made, such that a reasonable person would have believed that he is not free to leave with impunity, if the person chooses not to acquiesce, but to attempt to avoid the detention, then he is not seized until he is actually physically restrained. The issue of whether appropriate cause existed for the seizure is simply not subject to litigation unless and until a seizure occurs. If the individual acquiesces, he may complain; if he chooses not to acquiesce, but to attempt to avoid the detention, he may not litigate whether his seizure was justified until he was in fact physically

restrained. He cannot complain that during a period of flight he was illegally detained, or that he believed an illegal detention was imminent. Any action he undertakes in the interim, such as throwing a gun to the ground, is not subject to litigation, as the Fourth Amendment is not triggered until the seizure occurs. Any argument that if the individual would have acquiesced, the police would have detained him, and did not have cause, is speculative. As the Delgado Court held: individuals "may only litigate that which happened to them" (emphasis added). I.N.S. v Delgado, 104 S Ct 1765.

This Court in Delgado rejected a subjective notion of seizure by rejecting the claim that positioning agents by the door of a factory manifested an intent to detain such that a reasonable person would believe he would be detained if he did not give truthful answers to

otherwise proper questions put to him.

> Respondents argue, however, that the stationing of agents near the factory doors showed the INS's intent to prevent people from leaving. But there is nothing in the record indicating that this is what the agents actually did .... Likewise, the mere possibility that they would be questioned if they sought to leave the buildings should not have resulted in a reasonable apprehension by any of them that they would be seized or detained in any meaningful way.

This rule does not encourage police misconduct. The notion that the police will attempt to seize individuals without appropriate cause in the hope that they will flee, and while fleeing discard contraband or weapons, is beyond serious consideration. An individual who flees may only assert a Fourth Amendment right if caught; it makes no sense to allow him to raise a constitutional challenge or complain if he makes good his escape.

The standard submitted herein, then, is that a "seizure" of the person has occurred under the Fourth Amendment when

either 1) an individual, who is innocent of any crime, would reasonably believe, due to an exercise of official authority or a show of force, that he is not free to go on his way with impunity, and acquiesces to the exercise of official authority or show of force, or 2) an individual is actually physically restrained by the exercise of physical force. This standard has the analytical advantage of a "cause and effect" determination. If the police undertake to cause the restraint of an individual's freedom of movement, either by actual physical restraint or by the show of authority or show of force, and effect that restraint upon the freedom of movement, either by acquiescence to the exercise of authority or show of force, or by the application of physical force to the person of the individual, then a seizure has occurred, and the Fourth Amendment is triggered so as to require

an appropriate showing of cause. But if there is no effect - no deprivation of the freedom of locomotion - there is no basis to examine for causes and justifications.

C. Lower Court Dispositions

Several state court opinions warrant inspection, as, in petitioner's view, they represent, along with the opinion of the majority of the Michigan Supreme Court, a misapprehension of the term "seizure". The Louisiana Supreme Court found an impermissible seizure when police officers, having observed an unknown woman exiting a known narcotics address, pulled along side her, observed her place something in her waistband, turn, walk back toward the address, prompting the officers to "spring" from their car and overtake her as she was withdrawing glassine envelopes containing heroin. The Court found that the

officers could not approach the individual under conditions where a detention is imminent without reasonable suspicion or probable cause. Three Justices dissented, one finding the facts amounted to probable cause, one finding reasonable suspicion, and the final Justice finding that no "stop" occurred. "To turn and flee simply because she saw the police car approaching is not due to police action. This conduct, instead, is a spontaneous manifestation of guilt." State v Saia, 302 So 2d 869,877 (1974). Petitioner submits that this latter view affords the proper analysis.

The Massachusetts Supreme Court has found that a pursuit designed to effect a stop is impermissible under the Fourth Amendment, absent appropriate cause, holding that the stop starts when the pursuit begins. The Court noted that the pursuit of the bicycle rider in that case was conducted by several police cars,

marked and unmarked, with sirens blaring, and the stop was effected by the officers reaching from the car, grabbing the defendant from his bike, and throwing the defendant across the hood of the cruiser, whereupon two manila envelopes containing controlled substances were discovered. The Court failed to note that the police conduct in that case did not precipitate the flight, and that the individual's freedom of movement was not infringed upon until such time as the act of grabbing the defendant took place, at which time the contraband was discovered. There was no need to discuss the legal effect of the "pursuit", and consistent with the previous analysis it is here submitted that the dicta in the opinion is without a sound foundation in law.

D. The Instant Case

The instant case does not implicate the ultimate component of the proposed

seizure standard, as prior to the abandonment of the weapon, no restraint on respondent's freedom of movement had been accomplished, whatever the desires of the police or the perceptions of the respondent. There was no effect; thus, there is no need to examine for causes or justifications. Moreover, in this case the first component of the standard was not met, as the officers did not exercise any show of official authority or force, nor did they physically restrain respondent by the application of physical force to his person (before the gun was abandoned). The officers were in plainclothes, in an unmarked standard police vehicle. No questions or commands were issued by the officers, nor did they have the opportunity to provide the respondent with any identification. The police, by their conduct, did not cause any restraint upon the respondent's freedom of movement. Moreover, the respondent

did not manifest a reasonable belief that he was not free to walk or run away, nor acquiesce to any perceived police conduct. The respondent broke into a run, attempting to elude the police, though the police had done nothing to trigger the flight. The majority opinion of the Michigan Supreme Court runs afoul of the Delgado teaching by engaging in the speculative analysis that "If he [the respondent] stopped running, he would not have been free to leave. Events proved that." People v Shabaz, 424 Mich at 66. Such an observation in fact argues that until respondent stopped running he was in fact free to leave (was not detained), and he did exactly that "at flank speed". The facts in the instant case are not "so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded". I.N.S. v Delgado, 104 S Ct at 1763. The dissent

in the Michigan Supreme Court properly found "that the respondent's flight prevented any request for an explanation of [the respondent's] behavior"; therefore, there was not even a "stop" or "forcible stop" so as to trigger the Fourth Amendment.

The facts in this case demonstrate that there was no infringement of a citizen's right to walk away, nor any restraint upon the liberty of a citizen, by the official show of authority or physical force. The abandonment of the gun by respondent and its recovery by the police thus raises no question under the Fourth Amendment.

E. "Anticipatory Abandonment"

The Michigan Supreme Court held that the respondent's abandonment of the bag [containing the gun] was in direct response to an anticipated unjustifiable seizure (note that it will be argued

subsequently that the police did have a reasonable suspicion under the facts of this case, so that a stop was justified). People v Shabaz, 424 Mich at 66. The Court did not discern a difference between the seizure of the person and a possible subsequent search. Consistent with the petitioner's approach that a seizure does not occur until there is a restraint of movement, it is submitted that the search, the conduct attributable to the police from which the disclosure of evidence springs, does not occur until the seizure is effected and the search takes place. It is an unwarranted extrapolation of logic to assume that an individual, who has run at the sight of police officers, reasonably believes that the pursuit constitutes an illegal seizure, which will precipitate an illegal search of the person as well. Properly viewed, there is no such thing as an "anticipatory abandonment".

The Florida Supreme Court made this factual and legal distinction in a case wherein it was found that the initial stop was without justification; however, the act of abandonment was not a product of the illegal stop.

> Fundamental Fourth Amendment interests as well as sound logic support the prevailing case law in this subject. Until the actual police search has begun, it cannot be assumed that the police will search a person whom they have temporarily stopped on the street or that they will search such a person's car or other personal belongings. Not every temporary detention necessitates such action.... As a consequence, a person's abandonment of the property subsequent to an illegal police stop can hardly be considered the product of the stop.
>
> State v Oliver, 368 So.2d 1331 (Fla. App. 1979).

Consistent with the Florida approach, the Eleventh Circuit has found a voluntary abandonment in the face of allegedly improper police activity by employing a cause and effect analysis. In rejecting the factual claim that the

defendant had abandoned suitcases in a backyard in light of an illegal police entry and search of his home, the Court noted the abandonment took place prior to the entry. The Court continued on to find that whatever illegality may have resulted from the search and seizure of the bags was attenuated by the voluntary abandonment. United States v Pirolli, 673 F 2d 1200,1204 (CA 11, 1982). [citing United States v Colbert, 474 F 2d 174 (CA 5, 1973), recognizing that the illegality of an illegal stop or arrest may be attenuated by a voluntary abandonment.]. As noted previously, this rule does not invite police misconduct in this context, as the notion that the police will attempt to seize individuals without appropriate cause in the hope that they will flee, and while fleeing discard contraband or weapons, is beyond serious consideration. An individual may only assert a Fourth Amendment right if seized

and searched. Respondent here chose to relinquish his expectation of privacy in the bag containing the gun, and it was properly recovered by the police. See 1 LaFave, Search and Seizure, Sec. 2.6, pp. 366-368; City of St. Paul v Vaughn, 237 NW 2d 365 (1975); United States v Kendall, 655 F 2d 199 (CA 9, 1981), cert den 455 US 941.

ARGUMENT TWO

ASSUMING ARGUENDO THAT THE PURSUIT OF AN INDIVIDUAL BY AN UNDERCOVER OFFICER, WITHOUT MORE, CONSTITUTES A SEIZURE, INDEPENDENT OF AN ACTUAL PHYSICAL RESTRAINT, THE FLIGHT OF THE RESPONDENT AFTER LEAVING A BUILDING AT WHICH NARCOTIC AND WEAPONS OFFENSE ARRESTS HAD PREVIOUSLY BEEN MADE, AND AFTER ATTEMPTING TO HIDE A PAPER BAG IN HIS VEST OR PANTS UPON THE OBSERVATION OF AN UNMARKED POLICE CAR, CONSTITUTED REASONABLE SUSPICION FOR AN INVESTIGATIVE DETENTION.

Reasonableness is the touchstone of Fourth Amendment analysis, and the scope of a particular intrusion by agents of the public upon the personal security of individuals is a central element of the reasonableness analysis. In the creation of the Terry class of "seizure", a balance was struck between the minimal nature of the intrusion upon the privacy rights of the individual and the governmental interest in preventing criminal activity. Reasonable suspicion of criminal activity warrants a temporary

detention for purposes of questioning limited to the purpose of the stop. United States v Brignoni-Ponce, 422 US 873, 881-2 (1975); Florida v Royer, 460 US at 499.

In balancing the interests, the Royer Court dispelled any doubt that the public's interest in the suppression of illegal drug transactions or other serious crimes is a weighty concern which will warrant a temporary detention. 460 US at 500. The Shabaz dissent made reference to the equally serious governmental interest in the prevention of violence due to unlawful use of handguns. "A pursuit in the attempt to stop to ascertain whether or not a weapon is being concealed is a minuscule intrusion when weighed against the havoc caused by weapons." People v Shabaz, 424 Mich at 72.

In justifying the minimally intrusive Terry stop, the officer must have an

objective justification or reasonable suspicion that an individual is involved in criminal activity. Brown v Texas, 443 US at 51; Terry v Ohio, 392 US at 21. The reasonable suspicion is an aggregate of specific articulable facts, together with rational inferences from those facts. United States v Brignoni-Ponce, 422 US at 884.

> Courts have used a variety of terms to capture the elusive concept of what cause is sufficient to authorize police to stop a person. Terms like "articulable reason" and "founded suspicion" are not self-defining; they fall short of providing clear guidance of the myriad factual situations that arise. But the essence of all that has been written is that the totality of circumstances - the whole picture - must be taken into account. Based upon the whole picture, the detaining officer must have a particularized and objective basis for suspecting the particular person stopped of criminal activity. [cites ommitted]
>
> The idea that the assessment of the whole picture must yield a particularized suspicion contains two elements, each of which must be present before a stop is permissible. First, the assessment must be based upon all the circum-

> stances. The analysis proceeds with various objective observations, information from police reports, if such are available, and consideration of the modes or patterns of operation of certain kinds of lawbreakers. From these data, a trained officer draws inferences and makes deductions-inferences and deductions that might well elude an untrained person.
>
> United States v Cortez, 449 US 411,417 (1981).

In the assessment of the whole picture, each circumstance, and the reasonable inferences drawn therefrom, is scrutinized. It is submitted that just as in a probable cause determination, the laminated total which evolves may well be stronger than simply the sum of the layers. See generally United States v Lewis, 556 F 2d 385 (CA 6, 1977); United States v Ashcroft, 607 F 2d 1167, 1171 (CA 5, 1979).

A. Trained Law Enforcement Officer Deduction

In assessing those factors articulated in support of the reasonable suspicion

courts recognize that trained law enforcement officers may well be "able to perceive and articulate meaning in given conduct which would be wholly innocent to the untrained observer". Brown v Texas, 443 US at 52, n.2; United States v Mendenhall, 446 US at 564-5; United States v Cortez, 449 US at 417. In the instant case, the eleven year veteran officer articulated the factors which in his mind, and based on his experience, lead him reasonably to believe that a weapon or narcotics was being secreted by the respondent. The majority opinion did not credit the experience of the officer; whereas the dissent in its assessment of the whole picture credited the experience of the officer and noted the trial court's determination that the officer was "highly credible". People v Shabaz, 424 Mich at 75. The officer's experience is a factor in the assessment of the whole picture.

B. Nature and Character of the Area

This Court has observed on more than one occasion that a police officer may take into account the nature and character of a particular area in his assessment of the whole picture. United States v Brignoni-Ponce, 422 US at 884-5; United States v Mendenhall, 446 US at 564-5.

C. Flight or Evasive Conduct

This Court has recognized that flight and deliberately furtive actions at the approach of strangers or law enforcement officers yields "a strong indicia of mens rea" which, when coupled with specific knowledge relating to a high crime area [and a specific incidence of specific crimes], may be factored into a reasonable suspicion of criminal activity, or indeed a probable cause assessment. Sibron v New York, 392 US at 66; United States v Sharpe, __ US __; 105 S Ct 1568;

84 L Ed 2d 605 (1985); United States v Green, 670 F 2d 1148,1152 (DC. CA, 1981); United States v Brignoni-Ponce, 422 US at 885.

It should be observed that the Shabaz majority opinion is internally inconsistent. First, the court found the pursuit to be an obtrusive police confrontation with the respondent, and therefore no abandonment in the throw of the bag containing the gun, as respondent could reasonably have feared an imminent unlawful detention. But then the court found a lack of reasonable suspicion for a stop because the respondent could not have been attributed with the knowledge that the three unknown persons in a "private" motor vehicle were in fact police, so that his conduct in running at the sight of them might be regarded as suspicious! Petitioner leaves for another day and another case, the question of suspicion arising from flight

alone at the approach of undercover police officers. The instant case is not limited to a single factor assessment.

D. Act of Concealment

A furtive gesture or gestures, including the act of concealment, and reasonable inferences which may be drawn therefrom by an experienced officer, is a factor which may be taken into account by an officer in justifying his belief that he is observing criminal activity. Sibron v New York, 392 US at 66; United States v Green, 670 F 2d 1149,1152 (CA DC, 1981).

E. Conclusion

The Michigan Supreme Court majority erred in failing to find a reasonable suspicion in this case (assuming arguendo that any cause was necessary, a point argued in Issue I above). The failing of the court is demonstrated by its failure to consider the "whole picture", instead

examining each fact known to the officers in isolation rather than in conjunction with each other. Viewing the facts together, taking the "whole picture"--the experience of the officers, the nature of the area and past criminal conduct there, the furtive hiding gesture of the respondent, and respondent's flight at the sight of the officers--it must be said that a reasonable officer would have been derelict in the performance of his duties if he had not undertaken to inquire regarding the cause of this conduct. A forcible stop was thus justified.

CONCLUSION

Wherefore, petitioner concludes that this Court should reverse the Michigan Supreme Court, hold that the gun recovered by the police from respondent may be admitted into evidence at trial consistent with the Constitution, and remand for proceedings not inconsistent with this Court's opinion.

Respectfully submitted,

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Dated: May 12, 1986
ALS/dh

Supreme Court, U.S.
FILED
MAY 15 1986
JOSEPH F. SPANIOL, JR.
CLERK

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No. 85-1265

In the Supreme Court of the United States

OCTOBER TERM, 1985

PEOPLE OF THE STATE OF MICHIGAN, PETITIONER

v.

ASKIA KHALIL SHABAZ

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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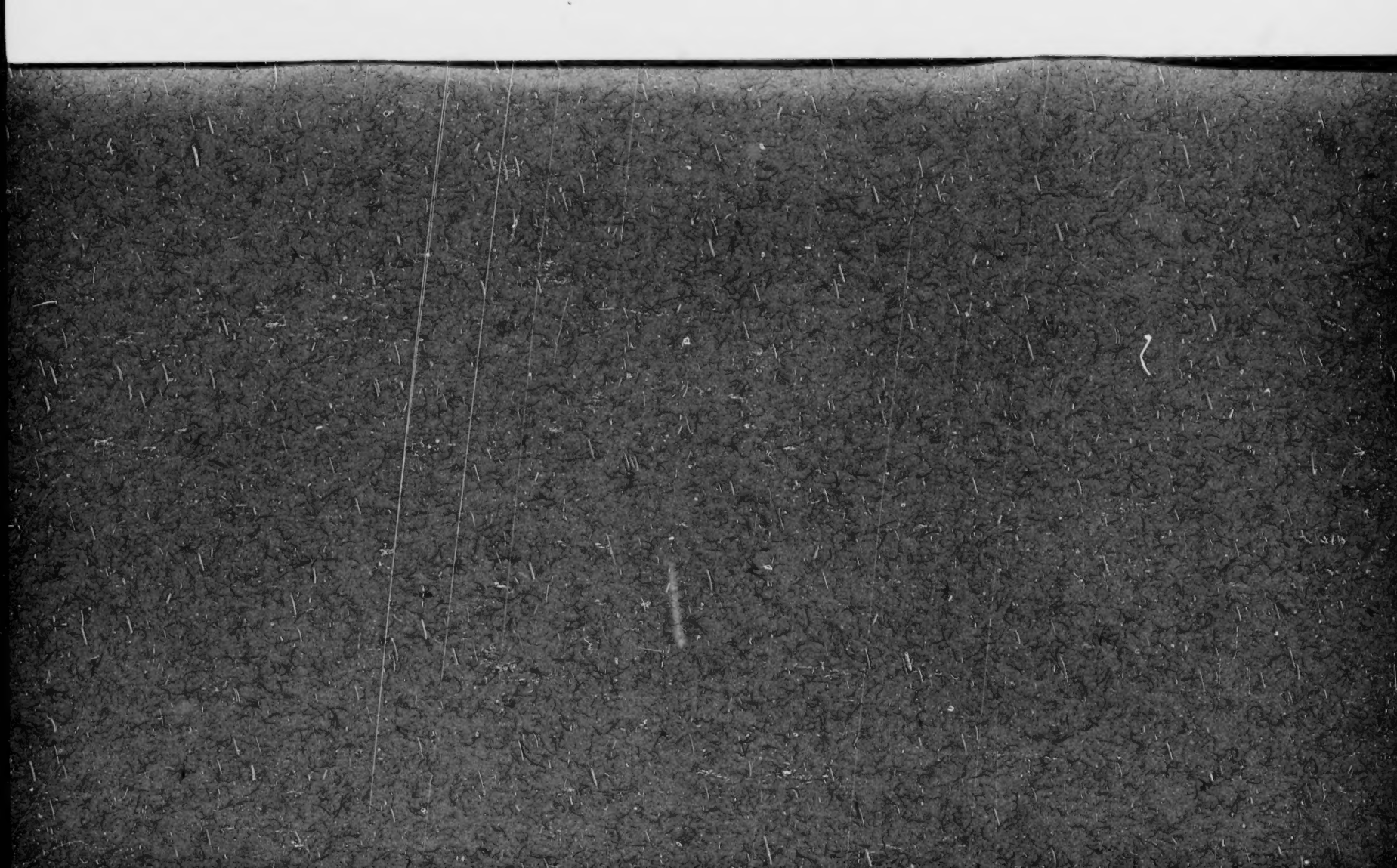

QUESTION PRESENTED

Whether respondent's flight from plainclothes police officers, in conjunction with other suspicious circumstances, gave rise to reasonable suspicion justifying a temporary investigative stop.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1265

PEOPLE OF THE STATE OF MICHIGAN, PETITIONER

v.

ASKIA KHALIL SHABAZ

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case raises the question whether the flight of a suspect under observation by police officers is a factor entitled to substantial weight in the officers' determination to conduct an investigative stop. That question is a significant one to law enforcement agencies generally. Its resolution is likely to have an impact on federal agents enforcing federal narcotics and firearms laws. In addition, the resolution of that question is likely to affect law enforcement agencies on federal reservations and in the District of Columbia, where those agencies have general law enforcement responsibilities. Finally, this case may well have an impact on federal prosecutions by affecting

the admission in federal proceedings of the fruits of local police actions such as those taken in this case.

STATEMENT

1. At 9:15 p.m. on July 10, 1982, three plain-clothes Detroit police officers were on patrol in an unmarked standard police detective vehicle (J.A. 6, 12, 28). Respondent came out of an apartment building at 60 Clairmount Avenue just west of Woodward Avenue in Detroit (J.A. 6-7). Officer Kenneth Surma, who testified at the preliminary examination and the evidentiary hearing, said that together with his partner he had made five or six concealed-weapon arrests and about 10 narcotics arrests at the building at 60 Clairmount Avenue during his 11 years working in the area (J.A. 8-10). Officer Surma testified that narcotics and concealed-weapon offenses were common in the vicinity of the intersection of Woodward and Clairmount Avenues, that there were many prostitutes at that corner, and that the police had had particular problems with the building at 60 Clairmount Avenue (J.A. 46).

Respondent, who was carrying a paper bag and walking toward the unmarked police car, looked in the direction of the car and immediately began to stuff the bag inside his clothing (J.A. 7, 12, 30-31, 32-33, 44). Officer Surma believed that respondent had either a weapon or narcotics hidden in the bag, and for that reason his partner started slowing the car down so they could "take a better look at what he was doing" (J.A. 12, 45). Respondent passed the car and, as the car slowed down but before it came to a stop, respondent began to run (J.A. 7, 12, 33-34, 45). Officer Surma got out of the car and chased respondent on foot for the distance of approximately three

storefronts. During the chase, Officer Surma's partner, Officer Hayes, acted as a backup (J.A. 12-13). At no time did Officer Surma tell respondent to stop or identify himself as a police officer (J.A. 35, 41). Officer Surma did not draw his service revolver at any time during the chase. While Officer Surma was pursuing respondent, however, Officer Hayes at some point drew his revolver and joined in the pursuit (J.A. 15).

Respondent ducked into a doorway at 9037 Woodward Avenue and was emerging as Officer Surma reached the doorway (J.A. 7-8, 13-14, 36-37). When respondent tried to push Officer Surma away, Surma grabbed respondent and pushed him toward Officer Hayes, who had arrived on the scene by that time (J.A. 8, 14, 37). After Officer Hayes had subdued respondent, Officer Surma went into the vestibule of the building at 9037 Woodward Avenue and found a brown paper bag containing a Smith & Wesson .357 Magnum revolver (J.A. 8, 41).

2. Respondent was charged with carrying a concealed weapon. At an evidentiary suppression hearing, the court found Officer Surma to be "a totally credible witness" (J.A. 51) but felt compelled by Michigan precedent to suppress the evidence (J.A. 51-54). The court noted "that this is an unfortunate result, the Defendant having four prior concealed weapons convictions" (J.A. 54-55). The Michigan Court of Appeals affirmed (Pet. App. 2a-15a).

The Supreme Court of Michigan granted leave to appeal and affirmed over the dissent of two justices (Pet. App. 16a-89a). The majority treated the pursuit as equivalent to a "stop and frisk" under *Terry* v. *Ohio*, 392 U.S. 1 (1968), which must be justified, not by probable cause, but by "a particularized suspi-

cion, based on an objective observation, that the person stopped has been, is, or is about to be engaged in criminal wrongdoing" (Pet. App. 46a (citing *Brown* v. *Texas*, 443 U.S. 47, 51 (1979))). The majority discounted respondent's presence in a high-crime neighborhood and his emergence from a known "narcotics pad." Those factors standing alone "would not establish the grounds for an investigatory stop," the court stated, because "[a] high neighborhood crime rate ordinarily requires the presence of both innocent victims and criminal perpetration" (Pet. App. 49a-50a). The majority also discounted respondent's concealment: his "effort to conceal the paper bag in his vest, by itself, did not afford grounds for a stop" (*id.* at 50a) because law-abiding citizens may wish to conceal things in a high-crime area and the suspicion raised by concealment is "only a generalized one" (*id.* at 51a).

Finally, repeating four times that respondent's flight *alone* was not enough to justify a stop (*id.* at 52a ("flight * * * by itself"), 53a ("flight alone" and "heightened general suspicion occasioned by the flight of a surveillance subject * * * alone"), 56a ("flight alone")), the majority discounted that factor as well. The majority regarded respondent's flight not as a suspicious act, but as the exercise of a "constitutional right to 'go on his way'—at top speed" (*id.* at 54a). Citing *Wong Sun* v. *United States*, 371 U.S. 471, 482 (1963), the majority also deemed respondent's behavior "ambiguous" because the plain-clothes officers from whom he fled were "three unknown persons in a 'private' motor vehicle" (*id.* at 56a & 66a-67a n.8). In a separate section of its opinion, the majority found that the totality of the circumstances did not justify a stop because each

factor was capable of innocent interpretation and because the officers could not see contraband on respondent's person or link him to a specific crime (*id.* at 57a).

SUMMARY OF ARGUMENT

This is a simple case that may be resolved by resort to settled principles. A *Terry* stop is permitted on the basis of reasonable suspicion that criminal activity *may be* afoot. That suspicion may be based on a series of acts that may each have innocent explanations when viewed in isolation. And furtive gestures and flight at the approach of strangers or police officers are strong indicia of *mens rea*. The Supreme Court of Michigan ignored these principles. When respondent's flight from the plainclothes officers is considered in conjunction with his deliberate concealment of the paper bag and his presence in a high-crime area and building, it is beyond doubt that there were grounds for reasonable suspicion. Because this Court's precedents provide a firm basis for finding that the officers had the requisite reasonable suspicion for a *Terry* stop, the seizure of the weapon in this case was not the product of a violation of respondent's rights under the Fourth Amendment.

ARGUMENT

RESPONDENT'S FLIGHT FROM PLAINCLOTHES POLICE OFFICERS, WHEN CONSIDERED TOGETHER WITH OTHER SUSPICIOUS CIRCUMSTANCES, JUSTIFIED A TEMPORARY INVESTIGATIVE STOP

In its petition for certiorari, petitioner raised two questions: whether the officers' pursuit of respondent constituted a "seizure" for Fourth Amendment purposes, and, if so, whether the pursuit of respondent

was reasonable. The United States will address only the second issue raised by the petition.

With regard to the first issue, we believe that police pursuit of a suspect is not necessarily equivalent to a *Terry* stop, at least in the absence of an order from the police directing the suspect to halt. See, *e.g.*, *State* v. *Sheffield*, 62 N.J. 441, 303 A.2d 68 (1973). This conclusion follows from the general principle that a Fourth Amendment "seizure" of a person occurs only when a police officer restrains the person's liberty by means of "physical force or show of authority." *Terry* v. *Ohio*, 392 U.S. 1, 19 n.16; see *Florida* v. *Royer*, 460 U.S. 491, 497-498 (1983) (opinion of White, J.); *United States* v. *Mendenhall*, 446 U.S. 544, 551-555 (1980) (opinion of Stewart, J.).

In this case, Officer Surma did not identify himself as a police officer, display a weapon, or order respondent to halt. On the basis of Officer Surma's conduct, then, we doubt that there was a sufficient show of force or authority to render the pursuit a Fourth Amendment "seizure." The record reflects, however, that at some point in the course of the chase Officer Hayes, Surma's backup officer, drew his service revolver. The display of a weapon may be a sufficient show of authority to convert a pursuit into a "seizure." See *Mendenhall*, 446 U.S. at 554 (opinion of Stewart, J.). Yet, in this case, the record does not reveal at what point in the chase Officer Hayes drew his weapon or where he was when he drew it. Because of the inadequacy of the record on this issue, and because the officers' conduct was reasonable even if the pursuit is considered to be a "seizure," we submit that it is unnecessary for the Court to resolve the first question presented by the petition in this

case. We therefore turn to the question of the reasonableness of the officers' decision to pursue respondent as he ran from them.[1]

1. The three cardinal principles that govern this case may be found in *Terry* v. *Ohio*, 392 U.S. 1 (1968), and its companion cases, *Peters* v. *New York* and *Sibron* v. *New York*, which are reported together at 392 U.S. 40 (1968).

First, probable cause is not required for a stop. Rather than eliminate all innocent explanations for behavior, or even determine that behavior is more likely to be culpable than innocent, a police officer may act when he "observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity *may be* afoot" (*Terry*, 392 U.S. at 30 (emphasis added)). As Professor LaFave has written, "it would seem clear [from *Terry*] that a more-probable-than-not standard is never applicable to a brief stopping for investigation." 3 W. LaFave, *Search and Seizure* § 9.3(b), at 65 (1978). Professor LaFave collects numerous cases in

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[1] We also disagree with the holding of the Michigan Supreme Court (Pet. App. 59a-61a) that the abandonment of property is necessarily rendered "involuntary" when it occurs during police pursuit. See, *e.g.*, *Smith* v. *State*, 333 So. 2d 91 (Fla. App. 1976); *People* v. *Boodle*, 47 N.Y.2d 398, 391 N.E.2d 1329, 418 N.Y.S.2d 352, cert. denied, 444 U.S. 969 (1979). Even when it is later determined that the police pursuit was unjustified because it was not based on a sufficient level of reasonable suspicion, the suspect's decision to discard property such as narcotics or weapons during the pursuit may be an act of sufficiently independent free will that the items should not be subject to suppression if they are subsequently recovered by the police. The State did not raise this issue in its petition, however, and we have therefore not addressed it in detail here.

which courts have "quite properly" upheld a *Terry* stop even though the actions observed are consistent with innocent activity (*id.* at 66 & n.48; *id.* at 49-50 n.48 (Supp. 1986)). See also *United States* v. *Cortez*, 449 U.S. 411, 418 (1981); *Illinois* v. *Gates*, 462 U.S. 213, 230-232 (1983); *Texas* v. *Brown*, 460 U.S. 730, 742 (1983) (plurality opinion). As the Court has emphasized, the factors supporting a finding of reasonable suspicion must be viewed in light of the inferences and deductions that a trained and experienced officer would make, "inferences and deductions that might well elude an untrained person." *Cortez*, 449 U.S. at 418; *Mendenhall*, 446 U.S. at 563 (opinion of Powell, J.); *Brown* v. *Texas*, 443 U.S. 47, 52 n.2 (1979) (a trained, experienced police officer "is able to perceive and articulate meaning in given conduct which would be wholly innocent to the untrained observer").

Second, although the officer's suspicion must be based on articulable facts, it is an improper mode of analysis to consider each fact in isolation and decide whether, standing alone, each fact would justify a stop. "[A] series of acts, each of them perhaps innocent in itself, * * * taken together [may] warrant[] further investigation" (*Terry*, 392 U.S. at 22). See also *United States* v. *Cortez*, 449 U.S. 411, 417-418 (1981) ("the essence of all that has been written is that the totality of the circumstances—the whole picture—must be taken into account").

Third, flight and furtive acts at the sight of police officers, whether in plain clothes or in uniforms, is highly significant. In *Peters*, the Court considered, under the higher "probable cause" standard, the significance of flight from an off-duty police officer in civilian clothes (392 U.S. at 48). The officer heard

noises at the door of his apartment and on investigation saw two men whom he did not know tiptoeing furtively in the hall. They took flight when the officer appeared. Chief Justice Warren wrote for the Court:

> It is difficult to conceive of stronger grounds for arrest, short of actual eyewitness observation of criminal activity. As the trial court explicitly recognized, *deliberately furtive actions and flight at the approach of strangers or law officers are strong indicia of mens rea,* and when coupled with specific knowledge on the part of the officer relating the suspect to the evidence of crime, they are proper factors to be considered in the decision to make an arrest.

392 U.S. at 66-67 (emphasis added; footnote omitted); accord, *Florida* v. *Rodriguez*, No. 83-1367 (Nov. 13, 1984), slip op. 5 (per curiam); *United States* v. *Sharpe*, No. 83-529 (Mar. 20, 1985), slip op. 4 (Brennan, J., dissenting).

2. The opinion of the Michigan Supreme Court ignores, and is inconsistent with, every one of these principles. The court hypothesized innocent explanations for respondent's behavior (Pet. App. 50a, 56a) and improperly concluded that the police officers lacked even a reasonable suspicion of criminal activity so long as they had to "speculate" that those innocent explanations were not true. The court considered separately each of three factors—presence at a high-crime location, concealment of the paper bag, and flight—and based its evaluation of the "totality of the circumstances" on the suspicious nature *vel non* of each factor standing alone. And the court treated "deliberately furtive actions and flight at the approach of strangers" not as the "strong indicia of *mens rea*" that this Court has deemed them to be, but as "am-

biguous" behavior that adds virtually nothing to other suspicious circumstances. It is this last error—the treatment of flight as insignificant—that portends the greatest interference with effective enforcement of narcotics and weapons laws.

It is beyond all dispute that flight generally is a significant factor in determinations of either probable cause or reasonable suspicion. See 1 W. LaFave, *supra*, § 3.6(e), at 669 & n.95; 3 *id.* § 9.3(c), at 74-75 & nn.96, 99 & 106. At the same time, there are certain circumstances in which flight is sufficiently ambiguous that it does not support a probable cause determination. Those circumstances are illustrated by *Wong Sun* v. *United States*, 371 U.S. 471 (1963). Based on the tip of one Hom Way, who had never before been an informant (371 U.S. at 473, 480), the police in *Wong Sun* went off "in search of one 'Blackie Toy's' laundry—and whether by chance or other means (the record does not say) they came upon [James Wah] Toy's laundry, which bore not his name over the door, but the unrevealing label 'Oye's' " (*id.* at 481). The narcotics agent who knocked on the door of that laundry at 6 a.m. "stat[ed] that he had come for laundry and dry cleaning [and,] before Toy fled, * * * never adequately dispelled the misimpression engendered by his own ruse" (*id.* at 483). In addition, the agent "made no effort * * * to ascertain whether the man at the door was the 'Blackie Toy' named by Hom Way" (*ibid.*). Since the agent had misrepresented his purpose and had no basis to suspect crime except the tip of an informant, who had named a man who might or might not be the man at the door, Toy's flight "signified a guilty knowledge no more clearly than it did a natural desire to repel an apparently

unauthorized intrusion" (*ibid.* (footnote omitted)). Thus, Toy's flight did not provide probable cause sufficient to justify breaking open Toy's door and following him to the bedroom where his wife and child lay sleeping (*id.* at 474).

The Michigan Supreme Court erred in relying on *Wong Sun* as a basis to conclude that respondent's flight lacked significance. *Wong Sun* involved not a stop but an arrest (and a particularly intrusive one); thus, the significance of Toy's flight was measured not against the reasonable suspicion standard of *Terry* but against the higher probable cause standard. The holding in *Wong Sun* that flight did not amount to probable cause hardly supports the proposition that it did not meet the lesser *Terry* standard either. Indeed, four Justices thought that Toy's flight met even the higher standard of probable cause (371 U.S. at 500-503 (Clark, J., dissenting)).

Moreover, when *Wong Sun* is read together with *Peters*, it becomes plain that it is the latter case that provides more helpful guidance on the significance of respondent's flight. Like the officers in both *Peters* and *Wong Sun*, Officer Surma was in plain clothes. Unlike the agent in *Wong Sun*, however, Officer Surma did not misrepresent his purpose.[2] Like the

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[2] In fact, it is obvious in retrospect that respondent must have recognized Officer Surma and his partners as police officers. Had he thought otherwise, he would hardly have disposed of the paper bag containing a firearm, his means of protection. Just as the police can recognize certain kinds of behavior that is characteristic of lawbreakers but is not obvious to the untrained person (see *United States* v. *Cortez*, 449 U.S. 411, 418 (1981)), so can many lawbreakers, without extraordinary effort or perspicacity, recognize plainclothes police and unmarked standard police detective cars. See, *e.g.*, *State* v. *Wade*, 390 So. 2d 1309, 1312 (La. 1980); see also

officer in *Peters*, but unlike the agent in *Wong Sun*, Officer Surma had directly observed the specific suspect's furtive behavior (concealment of the paper bag) before the flight took place. Thus, the strong possibility of mistaken identity present in *Wong Sun* was absent from this case and from *Peters*.[3] To be sure, it was possible that, while Officer Surma had the "right person," no crime had been committed. But again, the fundamental lesson of *Terry* is that stops are justified when crime "may be afoot"; it is not necessary for the officers to have probable cause to believe that an offense has been committed.[4]

Florida v. *Rodriguez*, *supra*. This may be one of the sound reasons why Chief Justice Warren in *Peters* described flight from strangers *or* law officers as strongly indicating *mens rea*.

[3] The element of mistaken identity is critical to understanding why *Wong Sun* and *Peters* are consistent with one another. In *Peters*, the Court deemed flight from a stranger a highly significant factor in determining probable cause "when coupled with specific knowledge on the part of the officer relating the suspect to the evidence of crime" (392 U.S. at 66). In *Wong Sun*, such specific knowledge was lacking: the "evidence of crime" was a tip from Hom Way relating to "Blackie Toy," and the fleeing suspect was known only to be the proprietor of "Oye's" laundry. Of course, the present case is not an arrest case like *Wong Sun* and *Peters* but a "stop" case, and flight and furtive behavior may be considered in a stop case without being coupled with specific knowledge relating the suspect to the evidence of crime. See *Florida* v. *Rodriguez*, No. 83-1367 (Nov. 13, 1984), slip op. 5 (per curiam); *Mendenhall*, 446 U.S. at 563-564 (opinion of Powell, J.) ("[l]aw enforcement officers may rely on * * * the behavior of a suspect who appears to be evading police contact"); *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 884-885 (1975); 3 W. LaFave, *supra*, § 9.3(c), at 75 n.99.

[4] The Michigan Supreme Court appears to have read this Court's occasional use of the phrase "particularized suspi-

For these reasons, the analysis of flight by the Michigan Supreme Court cannot stand under this Court's precedents. Nor is it logically sound. The Michigan court apparently believed that to treat flight as suspicious, even in combination with other factors, would penalize respondent's exercise of his "constitutional right to 'go on his way'—at top speed" (Pet. App. 54a (quoting *Florida* v. *Royer*, 460 U.S. 491, 498 (1983) (plurality opinion))). But the Constitution is not so undiscriminating. Assuming arguendo that the police lacked adequate grounds to stop respondent when they observed him coming out of 60 Clairmount, then he had every right to keep walking along the street as he was doing. By "going on his way" in that manner, he would not have created reasonable suspicion where it did not otherwise exist. But respondent did more; as the Michigan Supreme Court recognized, he took off "at top speed." Nothing in this Court's decisions remotely suggests that any constitutional right to go on one's way precludes the police from drawing inferences from the *manner* in

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cion" to suggest that it was necessary for the officers to suspect respondent of a particular crime before they could lawfully stop him. The court repeatedly distinguished "general" or "generalized" suspicion, which it did not dispute that Officer Surma had, from "particularized suspicion," by which it apparently meant suspicion of a particular crime. See Pet. App. 51a, 53a; see also *id.* at 57a. That, however, is not the meaning this Court has given to the term. "Particularized suspicion" simply means suspicion that is focused on a particular suspect. See *United States* v. *Cortez*, 449 U.S. 411, 418 (1981) (emphasis added) ("particularized suspicion" has two elements: assessment based on all the circumstances and "a suspicion that the *particular individual* being stopped is engaged in wrongdoing").

which one exercises that right.[5] *Peters* stands firmly to the contrary.

3. If the analysis begins, as it should, with *Peters*, it is a simple matter to conclude that the stop of respondent was supported by "articulable suspicion" (see *Florida* v. *Royer*, 460 U.S. 491, 498 (1983) (plurality opinion)). The three pertinent facts are easily articulable: (1) respondent was in a high-crime neighborhood and had just emerged from a building that was a more particular focus of crime; (2) respondent immediately sought to conceal his paper bag when he saw the unmarked police car; and (3) respondent took flight at high speed when the car slowed down.

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[5] "As one empirical study concluded: 'A person who * * * changes his direction in an apparent attempt to avoid confronting the officer, or who flees at the sight of an officer will commonly be detained and questioned.' It is not to be doubted that such reactions may be taken into account by the police and that together with other suspicious circumstances these reactions may well justify a stopping for investigation." 3 W. LaFave, *supra*, § 9.3(c), at 74 (footnote omitted) (quoting L. Tiffany, D. McIntyre & D. Rotenberg, *Detection of Crime* 32 (1967)); see also *id.* at 75 (footnote omitted) ("stops have been upheld * * * when the person engaged in a rather extreme means of avoidance such as high-speed flight"). The record in this case confirms the importance that experienced police officers attach to high-speed flight. Officer Surma was asked by defense counsel, "If somebody came out of [a nearby] supermarket with even a smaller bag than the one that Mr. Shabaz had and put it underneath his coat or in his pants, would you stop him?" He responded, "It all depends. It could have been supermarket holdup he—if he started running, I would probably think." J.A. 48. This Court has emphasized that factors such as these "must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement." *United States* v. *Cortez*, 449 U.S. 411, 418 (1981).

Given the universal recognition that sudden concealment of an unknown object is a furtive gesture that may be considered with other factors in assessing the legality of a stop or arrest,[6] factors (2) and (3) combine to provide the "deliberately furtive actions and flight at the approach of strangers or law officers" that *Peters* declares to be "strong indicia of *mens rea*." We doubt that any more was necessary. But there was more. Factor (1), respondent's location at the time, is again a factor universally recognized as significant when coupled with other suspicious circumstances.[7] When this factor is added to

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[6] See, *e.g.*, *United States* v. *Green*, 670 F.2d 1148, 1151, 1153 (D.C. Cir. 1981); *United States* v. *White*, 648 F.2d 29, 44 n.52 (D.C. Cir. 1981); *United States* v. *Sanders*, 631 F.2d 1309, 1312 & n.4 (8th Cir. 1980), cert. denied, 449 U.S. 1127 (1981); *United States* v. *Orozco*, 590 F.2d 789, 792 (9th Cir.), cert. denied, 439 U.S. 1049 (1978) and 442 U.S. 920 (1979); *United States* v. *Walker*, 576 F.2d 253 (9th Cir. 1978) (per curiam), modified on other grounds, 590 F.2d 297, cert. denied, 439 U.S. 1081 (1979); *Price* v. *United States*, 429 A.2d 514, 517 (D.C. 1981); *Jeffreys* v. *United States*, 312 A.2d 308, 310 (D.C. 1973).

[7] See, *e.g.*, *United States* v. *Lucas*, 778 F.2d 885, 888 (D.C. Cir. 1985) (per curiam); *United States* v. *Rickus*, 737 F.2d 360, 365 (3d Cir. 1984); *United States* v. *Green*, 670 F.2d 1148, 1151, 1152 (D.C. Cir. 1981); *United States* v. *Tate*, 648 F.2d 939, 942 (4th Cir. 1981); *United States* v. *Orozco*, 590 F.2d 789, 792 (9th Cir.), cert. denied, 439 U.S. 1049 (1978) and 442 U.S. 920 (1979); *United States* v. *Magda*, 547 F.2d 756, 759 (2d Cir. 1976); *United States* v. *Davis*, 458 F.2d 819, 822 (D.C. Cir. 1972) (per curiam). See also 3 W. LaFave, *supra*, § 9.3(c), at 79; 1 *id.* § 3.6(g), at 676, 678 (footnote omitted) ("To require police to disregard facts which, as a practical matter, are highly relevant to the determination of probable cause, would do violence to the underlying purpose of the Fourth Amendment's probable cause

the already strong suspicion created by flight and concealment, there can be no doubt that the stop in this case was justified. Cf. *United States* v. *Green*, 670 F.2d 1148, 1151 (D.C. Cir. 1981) (same three facts, plus a "sequence of events * * * typical of a two-party narcotics transaction," met the higher probable cause standard, even though "no one of these factors alone would be adequate to establish probable cause").

Consider the alternative. Must the police, while patrolling a high-crime neighborhood, sit by impassively when someone emerges from a notorious building, sees them, immediately conceals an object, and takes off running when they slow down? It may be that the possible innocent explanation for this behavior would have precluded an arrest based on probable cause. But to paraphrase *Terry* (392 U.S. at 23), it would be poor police work indeed for an officer of 11 years' experience in the detection of weapons and narcotics offenses in the same neighborhood to have failed to investigate this behavior further. See also *Adams* v. *Williams*, 407 U.S. 143, 145-146 (1972); 3 W. LaFave, *supra*, § 9.3(b), at 66 & n.49. We submit that the Constitution does not require that result.

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requirement and would in fact do a disservice to the 'honest citizen' residing in a high-crime area."). Of course, the location of particular activity is ordinarily not enough, standing alone, to justify a stop. See *Brown* v. *Texas*, 443 U.S. 47 (1979).

CONCLUSION

The judgment of the Supreme Court of Michigan should be reversed.

Respectfully submitted.

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MAY 1986

☆ U. S. GOVERNMENT PRINTING OFFICE: 1986 491507 20218